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Oceans and the law of the sea

Note by the Secretary-General

1. The Secretary-General has the honour to transmit to the General Assembly a letter dated 23 June 2006 from the secretary-general of the International Maritime Organization (IMO) (see annex) transmitting the report of the Ad Hoc Consultative Meeting of senior representatives of international organizations, convened by IMO, on the subject of the "genuine link", with appendices.

2. With the consent of IMO, some appendices or parts of appendices containing previously issued material have been omitted.

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Annex

Letter dated 23 June 2006 from the secretary-general of the International Maritime Organization addressed to the Secretary-General

I have the honour to refer to General Assembly resolutions 58/240 (para. 28) and 58/14 (para. 22), in which the Assembly invites the International Maritime Organization (IMO) and other relevant agencies to study, examine and clarify the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels.

I also refer to Assembly resolutions 59/24 (para. 41) and 59/25 (para. 30) requesting the Secretary-General to report to the Assembly at its sixty-first session on the study undertaken by IMO in cooperation with other competent international organizations on the role of the "genuine link" and the potential consequences of non-compliance with duties and obligations of flag States described in relevant international instruments.

In response to these requests, IMO convened an Ad Hoc Consultative Meeting of senior representatives of international organizations on the subject of the "genuine link", which met at IMO headquarters on 7 and 8 July 2005; its report (with its appendices) is enclosed herewith for submission to the Assembly for consideration.

The report was presented for comment to the IMO Council at its ninety-sixth session (19-23 June 2006). The Council found it a comprehensive and useful tool that may be used to highlight the features and extent of the obligations imposed upon flag States by the 1982 United Nations Convention on the Law of the Sea.

The Council noted the substantial achievements that have been made in the areas of maritime safety and reduction of marine pollution from ships and, in this connection, stressed the need to highlight the improvements achieved in the strengthening of flag State jurisdiction and the subsequent improvement in flag States' enforcement of their international legal obligations as a result of the work of IMO.

In addition, the Council agreed with the conclusion of the authors of the report (see para. 54) that there was no purpose to be served by reconvening the Meeting unless future developments dictated otherwise.

The Council reiterated the need for States to comply with their international obligations with respect to ships flying their flags and, in this regard, noted that sanctions consisting of suspension of registration and the use of the flag, which was one possibility mooted by the Meeting (see para. 45), could be counterproductive and lead to the unwanted consequences of re-registration with countries not properly fulfilling the "genuine link" requirements regulated by the United Nations Convention on the Law of the Sea.

I should be grateful if the present letter were brought to the attention of the Assembly, together with the report of the Meeting.

(*Signed*) Efthimios E. **Mitropoulos**
Secretary-general
International Maritime Organization

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Report of the Ad Hoc Consultative Meeting of senior representatives of international organizations on the "genuine link"

I. Opening of the session

1. The Ad Hoc Consultative Meeting of senior representatives of international organizations on the subject of the "genuine link" met from 7 to 8 July 2005 at the headquarters of the International Maritime Organization (IMO).

2. The Meeting was chaired by R. P. Balkin, Director, IMO Legal Affairs and External Relations Division.

3. The session was attended by representatives of the Division for Ocean Affairs and the Law of the Sea of the United Nations, the Food and Agriculture Organization of the United Nations (FAO), the International Labour Organization (ILO), the United Nations Conference on Trade and Development (UNCTAD), and IMO. The Organization for Economic Cooperation and Development (OECD) sent apologies.

4. In welcoming the participants on behalf of the secretary-general of IMO, R. P. Balkin briefly recalled the developments that had led up to this Ad Hoc Consultative Meeting, in particular, the meeting of the inter-agency Consultative Group on Flag State Implementation that had taken place in Paris in 2003 and the comprehensive document resulting from it, namely, the report of the Secretary-General of the United Nations (A/59/63), the "flag State implementation inventory document". That report, which was submitted to the General Assembly at its fifty-ninth session, set out the duties and obligations of flag States under relevant international law and provided an extensive catalogue of the strategic, regulatory and other initiatives undertaken by the participating organizations with regard to securing the effective exercise of flag State jurisdiction.

5. Ms. Balkin recalled General Assembly resolutions 58/240 (para. 28) and 58/14 (para. 22) in which the Assembly invited IMO and other relevant agencies to study, examine and clarify the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels. She further referred to resolutions 59/24 (para. 41) and 59/25 (para. 30), in which the Assembly requested the Secretary-General to report to the General Assembly at its sixty-first session on the study undertaken by IMO in cooperation with other competent international organizations on the role of the "genuine link" and the potential consequences of non-compliance with duties and obligations of flag States described in relevant international instruments.

II. Adoption of the agenda

6. The agenda was adopted.

III. Organization of work

7. Participants in the Meeting noted that a final report should be forwarded to the Secretary-General of the United Nations with a request that it be submitted to the General Assembly at its sixty-first session in 2006.

8. Participants in the Meeting agreed to consider:

(a) Further development of the conclusions reflected in paragraphs 210 to 221 of the flag State implementation inventory document;

(b) The submission of a report by the IMO secretariat to the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting, in June 2004, entitled "Strengthening of flag State implementation" (A/AC.259/11);

(c) A submission by ILO with observations relevant to the role of the flag State in connection with international labour standards for the maritime and fishing sectors and the role of the "genuine link" requirement in connection with flag State duties and comments on consequences and potential responses to failures on the part of a flag State to carry out its responsibilities;

(d) Additional information submitted by IMO on some specific outcomes of the work of IMO potentially relevant to the registration of ships;

(e) Information and proposals submitted by the organizations participating at the Meeting.

IV. Outcome

A. General considerations

9. Representatives of the organizations participating in the Meeting exchanged information on their recent activities relevant to the strengthening of flag State jurisdiction and port State control within the purview of their respective mandates. They also addressed the scope of the General Assembly recommendations. In doing so, they noted that the earlier flag State implementation inventory document provided an adequate answer to the request contained in paragraph 29 of General Assembly resolution 58/240 to prepare and disseminate to States a comprehensive elaboration of the duties and obligations of flag States, including the potential consequences of non-compliance prescribed in the relevant international instruments.

10. They noted that it was not within their competence to provide a definition of the term "genuine link". In their view, this was a matter to be determined by States and international and domestic courts and tribunals on the basis of provisions contained in the 1982 United Nations Convention on the Law of the Sea and other applicable international instruments.

11. The organizations considered that the question of the role of the "genuine link" under the United Nations Convention on the Law of the Sea is a different question and is directly related to the issue of the effective exercise of flag State obligations. The two matters were, in their view, inseparable, since the ability of a flag State to

effectively exercise its responsibilities appeared to be contingent upon a sufficiently strong link between the flag State and the ships flying its flag. Accordingly, they agreed that their work to study, examine and clarify the role of the "genuine link" should focus on two main issues, namely:

(a) The way in which this concept should be applied in order to strengthen compliance with duties and obligations imposed by the Convention and other international instruments upon flag States;

(b) The need to update and elaborate the strategic approaches and initiatives initially described in the flag State implementation inventory document and to provide a deepening of its conclusions, with the addition of further comments and conclusions on the role of the "genuine link".

12. Participants in the Meeting expressed concern about the problems that can arise when the flag State fails to fulfil its obligations. It was noted that the international regulatory system, as developed under the aegis of the different organizations, was dependent upon the effective exercise of flag State responsibilities. In this connection, representatives of the organizations participating in the Meeting provided examples of their past and ongoing efforts in the development of international rules and standards aimed at elaborating the duties of flag States and promoting their implementation.

13. Participants in the Meeting emphasized that international regulatory regimes should, where possible, be complemented by a sound economic framework providing incentives to shipowners and ship operators to comply with such regimes. This should be combined with an effective enforcement and compliance strategy that would ensure effective flag State supervision of ships and the imposition of adequate sanctions for cases of non-compliance. In this context, international organizations could continue to seek to coordinate their programmes aimed at identifying any difficulties facing flag States and assisting flag, port and coastal States in effectively implementing their responsibilities in connection with these roles.

14. Participants in the Meeting suggested that inter-agency cooperation aimed at ensuring the effective exercise of flag State jurisdiction might be strengthened through a comprehensive approach according to which issues such as safety, the prevention of marine pollution, decent working and living conditions for seafarers and fishers and the suppression of illegal fishing might be coordinated to ensure compliance with the purpose and aims of the United Nations Convention on the Law of the Sea and related international regulatory agreements. Participants in the Meeting noted, however, that the success of such inter-agency cooperation would remain dependent, to a large extent, upon action taken by States to ensure that the policies of their different government departments and agencies are coordinated in such a way that initiatives put forward for consideration in different international forums complement, rather than contradict or unnecessarily overlap with, each other.

15. After a full discussion of agenda items 3 and 4, participants in the Meeting agreed that the information provided at the Meeting and the observations reflected in the following paragraphs, together with the information contained in the flag State implementation inventory document and its conclusions, should be considered

as fulfilling the request by the General Assembly to study, examine and clarify the role of the "genuine link".

16. The following paragraphs reflect the considerations and observations of the participants in the Meeting regarding the role of the "genuine link" and the potential consequences of non-compliance with duties and obligations by flag States described in the relevant international instruments. The observations are made in light of the respective mandates and the activities of the participating organizations aimed at helping to ensure the effective exercise of flag State jurisdiction and control.

B. Legal framework for the concept of "genuine link"

1. United Nations Convention on the Law of the Sea

17. The role of the "genuine link", as referred to in article 91 of the United Nations Convention on the Law of the Sea, should be examined in the light of its purpose and operational context. Its meaning should be understood primarily in relation to the duties of flag States under international law as reflected in the Convention and other relevant international instruments.

18. The requirement under article 91, paragraph 1, that there be a "genuine link" between a ship and a State that has granted its nationality to that ship is related to the right of a State, acknowledged in the same paragraph, to fix the conditions for the grant of its nationality to ships, the registration of ships in its territory and the right of ships to fly its flag.

19. The primary obligations concerning ship safety and labour conditions assumed by the flag State as a consequence of granting its nationality and the correlative right to fly its flag to a ship in accordance with articles 91 and 92 are enshrined in article 94 of the Convention. However, as indicated in the flag State implementation inventory document, the range of flag State duties under the Convention is more extensive than the matters listed in article 94, which, clearly, is not intended as an exhaustive list. In particular, the duties of flag States in relation to the protection of the marine environment and conservation of marine living resources are set out in a number of articles throughout the Convention.

20. In accordance with article 94, paragraph 1 of the Convention, a State is obliged to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". Paragraphs 2, 3 and 4 of the same article enumerate the main obligations in this regard and refer to the fact that they should be complied with in accordance with generally accepted international regulations, procedures and practices and applicable international instruments.

21. Paragraph 5 of article 94 prescribes that, in taking the measures called for in paragraphs 3 and 4, States conform to generally accepted international regulations, procedures and practices and take any steps that may be necessary to secure their observance. Information regarding such rules, regulations and procedures adopted in the context of participating organizations are contained in the flag State implementation inventory document and the updates in the appendices to the present report.

22. Apart from these basic obligations, article 94, paragraph 6, provides one possible avenue of importance for responding to a failure by a flag State to implement its responsibilities. When a State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, it may report the fact to the flag State. In such a case, the flag State is obliged to respond by investigating the matter and, if appropriate, take any action necessary to remedy the situation. There are, of course, alternative responses by coastal and port States available, including detaining a ship, to deal with ships that are not operated in accordance with applicable international standards (whether because of a failure by a flag State to implement its responsibilities or for other reasons). However, alternatives for other States or for international organizations to respond to a failure by a flag State to fulfil its obligations are limited under current international law.

23. A further obligation imposed upon flag States by article 94, paragraph 7, is to hold inquiries into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment.

24. Participants in the Meeting noted that the purpose of the "genuine link" requirement in article 91 was the subject of authoritative interpretation by the International Tribunal for the Law of the Sea in the 1999 case, M/V *Saiga* (No.2). The Tribunal stated that the purpose of the provision of the Convention on the need for a "genuine link" between a ship and its flag State is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in the flag State may be challenged by other States. This interpretation necessarily derives from the right acknowledged by the United Nations Convention on the Law of the Sea, article 91, paragraph 1, of every State to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. Hence the conclusion arrived at by the Tribunal in the same case, to the effect that determination of the criteria and establishment of procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State. At the same time, it should be noted that the Tribunal distinguished between this question and the question of whether a "genuine link", in fact, exists in a particular case, the latter being a question that was open to review by the Tribunal, on the basis of evidence adduced by the parties. In the M/V *Saiga* (No.2) case, the Tribunal concluded that the evidence adduced by Guinea is not sufficient to justify its contention that there was no "genuine link" between the ship and Saint Vincent and the Grenadines at the material time.

2. Other international instruments addressing the question of the "genuine link" and registration of ships

25. Participants in the Meeting noted that the concept of the "genuine link" and its role with respect to flag State jurisdiction and control over ships is also found in other international agreements. For example, article 3, paragraph 3, of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) provides that no party to the Agreement "shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the Party is satisfied that it is able, taking into account the links that exist between it and the

fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel". The primary focus of the Compliance Agreement is on the question of the implementation of the duties of flag States with respect to fishing vessels. Nevertheless, it does address the question of the links between these vessels and the respective States enabling the fulfilment of the objectives of the Agreement.

26. The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995 Fish Stocks Agreement), follows a similar approach in emphasizing flag State duties (article 18).

27. Participants in the Meeting noted that the 1986 United Nations Convention on Conditions for Registration of Ships, which had attempted to address in a comprehensive manner the question of uniform criteria for the registration of ships, particularly in connection with the "genuine link" requirement, has not yet entered into force. The representative of UNCTAD informed the participants that UNCTAD continues to provide information on the quantitative and qualitative development of tonnage under major open registries and second registries as well as beneficial ownership. This information is generally made available in the annual publication, *Review of Maritime Transport*, for the benefit of policymakers, shipowners, shippers and other industry players. The most recent data available for 2005 indicate that 45 per cent of world merchant tonnage is registered under open-registry countries. This share is particularly high for dry bulk carriers, of which 53 per cent are operated under these flags. Beneficial ownership is concentrated in 10 major shipowning countries, which account for approximately 70 per cent of tonnage under open registries.

B. Conclusion

28. Participants in the Meeting took the view that the exclusivity attached by the United Nations Convention on the Law of the Sea to the right of States to fix conditions for the grant of nationality, as reaffirmed by the authoritative interpretations of the International Tribunal for the Law of the Sea in the M/V *Saiga* (No.2) and subsequent cases, as well the other agreements referred to in section 2 above, indicated that the questions relating to the precise criteria or conditions adopted by a State with respect to the grant of its nationality to a ship were a matter beyond the purview of the organizations participating in the Meeting. However, participants in the Meeting also considered that issues relating to securing the objective and purpose of the "genuine link" requirement, that is, assuring the ability of the flag State to effectively exercise its jurisdiction over ships flying its flag, were matters of central concern to all of the organizations and formed a substantial part of their programmes of regulatory initiatives and technical cooperation activities in the shipping and fishing sectors.

C. Recent initiatives of the participating organizations with respect to the strengthening of flag State jurisdiction and control

29. Participants in the Meeting discussed a number of recent initiatives with respect to ships and fishing vessels that appeared particularly relevant to progress on

the issues under consideration. To this end, the information contained in the flag State implementation inventory document regarding the activities relevant to the strengthening of flag State jurisdiction undertaken by the organizations participating at the Meeting has been updated and issued as appendix 3 to the present report.

1. International Maritime Organization

(a) Voluntary International Maritime Organization Member State Audit Scheme

30. The Meeting noted the introduction by IMO of the Voluntary IMO Member State Audit Scheme, which involves independent audits to be performed on States. Although the Scheme has been developed as voluntary, it could become compulsory in the future, should the IMO membership so decide. The objective of the Scheme is to provide an audited member State with a comprehensive and objective assessment of how effectively it administers and implements the key IMO technical treaties. Technical assistance can be provided, following an audit, to help with the introduction of any improvements that may be found necessary. Hand in hand with the development of the Audit Scheme has been the preparation of a code for the implementation of mandatory IMO instruments, which is intended to serve as the audit standard for the Scheme. States might consider the creation of similar schemes for matters strictly within the purview of FAO and ILO.

(b) Identification schemes for ships, companies and registered owners

31. Reference was also made to the development in IMO of two ship and company (shipowner operator) identification numbering schemes: the IMO Ship Identification Number Scheme (resolution A.600(15) and circular letter no. 1886/Rev.2) and the IMO Unique Company and Registered Owner Identification Number Scheme (resolution MSC.160(78) and circular letter no. 2554), which have been made mandatory under International Convention for the Safety of Life at Sea regulations XI-1/3 and 3-1, respectively. These Schemes, in combination with new security-related requirements, such as the continuous synopsis record to be carried on board ships, could serve to improve transparency with respect to parties responsible for the operation of the ship, irrespective of registration.

(c) Fishing vessels

32. The Meeting noted that several legal instruments, including the Torremolinos Protocol and the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, which articulate flag State responsibilities in relation to fishing vessels and fishers, have yet to enter into force. Participants in the Meeting noted the various ongoing initiatives of IMO making the entry into force of these instruments a priority for the Organization and, in particular, the convening of a second Joint IMO/FAO Working Group on Illegal, Unregulated and Unreported Fishing and Related Matters in 2006. Participants in the Meeting supported the need to explore the strengthening of a coordinated role of the agencies in the process of assisting each other in the entry into force of instruments.

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2. International Labour Organization

(a) Proposed International Labour Organization Maritime Labour Convention of 2006

33. The Meeting noted that the proposed Maritime Labour Convention of 2006, to be considered for adoption by a maritime session of the International Labour Conference in February 2006,* builds upon the earlier maritime labour conventions but more clearly assigns responsibility to the flag State for all labour and social matters on board its ships. The proposed Convention expressly provides for an effective compliance and enforcement system for labour and social conditions on board ships and is intended to secure a level playing field with respect to the conditions of work in this sector. The proposed Convention moves beyond the previous ILO maritime labour conventions to establish a system for flag State certification of specified minimum conditions on board ships.

34. The certificate system is expressly designed to work within the system for port State control, developed under the various memorandums of understanding, that is well-established in connection with ship safety, marine pollution and, more recently, with ship security measures. However, the maritime labour documentation system has additional elements that may better ensure both flag State implementation and enforcement and ongoing shipowner compliance with the Convention standards. First, it contains a "no more favourable treatment" clause for control activities in the ports of ratifying countries. Secondly, it requires shipowners, broadly defined as any entity that exercises the responsibilities of shipowners, to elaborate their approach to ensuring ongoing compliance with national law implementing the Convention standards on a ship-specific basis. This is set out in a document, the Declaration of Maritime Labour Compliance, which each ship will carry. Importantly, the flag State is also required to indicate, in the Declaration, the national legal requirements that it has adopted to implement the Convention standards. The Declaration will be attached to a certificate and will be available for inspection in foreign ports.

35. The maritime labour documentation system is supported by complaint mechanism procedures under which seafarers or other interested entities can bring a complaint in a port regarding a breach of the requirements of the Convention. The system is linked to the existing ILO supervisory mechanism through member reporting requirements regarding national implementation activities. The proposed Convention also provides for the filing of port State control reports on complaints and ship detentions with the Director-General of ILO. It is envisaged that a database will be set up, once the Convention is adopted, to monitor the reports.

36. The Convention also puts in place mandatory standards related to the use of recognized organizations and includes standards related to the provision of financial security by shipowners for repatriation and to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard.

* The Convention was eventually adopted on 23 February 2006 by the ninety-fourth (maritime) session of the International Labour Conference.

(b) Standards for decent work in fishing

37. A draft Work in Fishing Convention is currently under development. It will be considered for adoption by the International Labour Conference at its meeting in 2007. The draft, as developed to date, is similar in its approach and concerns to the proposed Maritime Labour Convention of 2006. However, it is tailored to address the particularities of the fishing sector. It also includes a part specifically devoted to securing compliance with and enforcement of conditions for work on fishing vessels. For example, it currently requires that a ratifying State "shall exercise effective jurisdiction and control over vessels flying its flag by establishing a system for ensuring compliance with the standards in the Convention including, as appropriate, inspections, reporting, monitoring, complaints procedures, appropriate penalties and corrective measures" (article 38). It provides for a document evidencing compliance with the national laws implementing the Convention and a complaint system and also includes a "no more favourable treatment" clause.

D. Other issues of relevance for the strengthening of flag State jurisdiction and control

1. Port State control

38. Participants in the Meeting recalled that port State control activities were complementary to, but do not replace, flag State control and noted the expansion of port State measures in various forums. In particular, the group noted the activities of FAO and ILO. The FAO Model Scheme on Port State Measures to combat Illegal, Unreported and Unregulated Fishing was developed with the support and participation of IMO and ILO. The inclusion of certification and port State control under the proposed Maritime Labour Convention of 2006 extends the enforcement mechanisms already existent in IMO safety and anti-pollution conventions to international regulations on conditions of labour on board. This innovative measure should be highlighted as a necessary complement to direct flag State control, to ensure that flag States comply with their duties as regulated in article 94 of the United Nations Convention on the Law of the Sea.

39. Participants in the Meeting considered developments in regional port State control regimes, in particular the 2004 Second Joint Ministerial Conference of the Paris and Tokyo Memorandums of Understanding on Port State Control. In this context, the ongoing work of the IMO Subcommittee on Flag State Implementation was especially noted.

2. Collection of data

40. Participants in the Meeting highlighted various initiatives that were under way or proposed by the organizations relating to the collection of data aimed at improving transparency and accountability with respect to standards on ships and fishing vessels. It was suggested that these might form the basis for enhanced cooperation among agencies. In this context, participants in the Meeting acknowledged the agreement on the provision of information to ILO by IMO concerning port State control-related data and that this issue was currently being addressed through the development of the port State control module of the IMO Global Integrated Shipping Information System. Furthermore, the Meeting identified potential developments, in relation to the ILO supervisory system, of a

possible database for reports related to the complaint mechanism under the proposed Maritime Labour Convention of 2006 and the FAO project on the identification of fishing vessels, as potential avenues for further coordination. Participants in the Meeting stressed that such initiatives should be addressed in a pragmatic way so that member States could benefit from the avoidance of duplication, in particular concerning the reporting requirements.

3. The need for an efficient national administration

41. Participants in the Meeting agreed on the importance of structured and efficient national administrations enabling flag States to effectively exercise their jurisdiction and control of vessels under their flag. In this regard, the group emphasized the need for effective supervision of recognized organizations by national administrations whenever they delegate to these entities responsibility for carrying out aspects of their respective flag State duties under international law. In this context, participants in the Meeting acknowledged the development by IMO of the Voluntary IMO Member State Audit Scheme and of goal-based standards.

4. Consequences of non-compliance by a flag State with its duties and obligations

42. The Meeting noted that the question of action to be taken to deter non-compliance by the flag State with obligations prescribed in international rules raises two interrelated main issues. The first concerns measures available to counteract non-compliance by means of disincentives aimed at ensuring that shipowners do not profit from violations of international rules and, in parallel, of incentives to those who comply with them. The second, more difficult issue concerns the consequences for a flag State that does not implement its responsibilities with respect to ships that fly its flag.

43. The two questions and responses are interrelated, particularly from an economic or commercial perspective, since in many cases ships that are not in compliance may be indicative of systemic non-compliance or failures at the flag State level. Evidence of ongoing failure to implement its responsibilities by a flag State may eventually lead to a situation in which a particular flag can be seen as less attractive to shipowners/operators as a result of increased scrutiny of ships that fly that particular flag. Nevertheless, from a legal and remedial perspective, the two issues raise different considerations.

44. Participants in the Meeting noted the conclusions expressed in paragraph 214 of the flag State implementation inventory document, to the effect that existing incentives for quality shipping, such as reduced inspection frequencies, or existing disincentives, such as potential detentions or increased inspections, may not be sufficient to counteract the profits obtained through substandard shipping. In this regard, the Meeting considered that an expansion of national and regional policies related to incentives and disincentives would be desirable but should be complemented by an effective deterrence system.

45. With respect to the question of deterrence, the Meeting noted that the United Nations Convention on the Law of the Sea and other relevant international conventions required that the States parties establish adequate enforcement mechanisms, including, where appropriate, sanctions severe enough to discourage violations, as part of the implementation process (see United Nations Convention on the Law of the Sea, article 217). The obligation to establish an effective system of

sanctions is primarily a matter for flag States. Aside from penalties of a financial nature, sanctions should include suspension from registration and the use of flag and, in cases of persistent violations, deletion from the flag State's registry.

46. In the case of financial penalties, participants in the Meeting considered that, in order to discourage violations and act as an effective deterrent system, the level of penalties would need to be sufficiently high to ensure that owners and operators could not compensate for these amounts with profits obtained from the operation of substandard ships. This kind of approach, which is reflected in the domestic environmental laws of some States, is called "profit stripping". Research by OECD has shown that, frequently, the profits gained by not complying with international regulations are greater than penalties for non-compliance. To be effective, such an approach would also require that third-party liability insurers not include the payment of financial penalties within the scope of their insurance coverage.

47. With respect to the consequences of non-compliance by flag States, participants in the Meeting noted that there is a limited scope for responses under general international law and even less scope for direct action by international organizations. Ultimately, the responsibility for action against non-compliant States lies with other States. Some conventions, such as the United Nations Convention on the Law of the Sea (part XV) and the 1995 Fish Stocks Agreement (part VIII), contain a set of provisions for the settlement of disputes. Other types of remedies or responses are also provided in the United Nations Convention on the Law of the Sea, article 94 (6) and part XII, section 7. Article 94 (6) imposes upon the flag State an obligation to investigate reports from other States having clear grounds to believe that proper jurisdiction and control have not been exercised. Part XII, section 7, sets out detailed procedural rules to be followed by flag States and other States to prevent or punish pollution damage. These rules relate, inter alia, to the investigation of foreign vessels, the institution of proceedings, the notification to flag States of measures taken and monetary penalties.

48. It was noted that ILO differs somewhat from most other international organizations in that, under its constitution, it has a well-developed supervisory system that provides for the monitoring of implementation activities by member States, through a tripartite process. It also provides for the possibility that representations can be made by an industrial association of employers or workers to ILO with respect to a failure by a member to observe a convention to which it is a party. This process can result in an inquiry and, possibly, a decision by the International Court of Justice.

49. Participants in the Meeting noted the evolving practice of the adoption of collective measures by States within the framework of regional fishery management organizations to deal with non-compliant States. In this context, the Meeting welcomed the expected involvement of regional fishery management organizations in the forthcoming second meeting of the joint IMO/FAO Working Group on Illegal, Unregulated and Unreported Fishing and Related Matters.

50. Above all, participants in the Meeting noted the restrictions placed by the current mandates of the participating organizations to respond to non-compliance by States. In this respect, the role of the agencies is primarily a regulatory one, in addition to their work in facilitating compliance through technical cooperation and the sharing of information.

E. Promoting compliance

51. Participants in the Meeting noted that the practice of transferring responsibilities between entities such as classification societies and insurers had the potential to affect the ability of flag States to meet their obligations. Participants in the Meeting supported the idea of "compliance in motion", which is to say, ensuring ongoing compliance with international regulations wherever a ship is operating, irrespective of registry or flag. In this context, participants in the Meeting welcomed the progress made by IMO on the issues of transfer of flags ("flag-hopping") and transfer of class, while confirming that these issues merited further consideration.

52. Participants in the Meeting stressed the importance of developing a "compliance culture". It was suggested, in this context, that the organizations concerned increase their cooperation in technical cooperation activities designed to enhance flag State implementation. These activities should cover the complete range of responsibilities of flag States, as contained in the mandates of the respective organizations.

53. Participants in the Meeting suggested that a joint model course on flag State implementation covering all flag State responsibilities falling within the mandates of the various agencies, might be useful.

F. Other business

54. Participants in the Meeting considered that there was no need, at this stage, to reconvene unless future developments dictated otherwise.

Appendix 1

Examination and clarification of the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flags, including fishing vessels, submitted by the International Labour Office

Summary

The present submission contains the International Labour Organization comments for consideration by the inter-agency meeting organized by the International Maritime Organization in response to the General Assembly resolutions 58/240 on oceans and the law of the sea and 58/14 on sustainable fisheries.

I. Introduction

1. The present submission responds to the invitation of the Secretary-General of the International Maritime Organization (IMO) to provide comments for consideration by an inter-agency meeting organized in response to the General Assembly resolution 58/240 on oceans and the law of the sea and resolution 58/14 on sustainable fisheries, in which the Assembly requested that IMO and other competent organizations, study, examine and clarify the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flags, including fishing vessels.

2. On 17 November 2004, the General Assembly also requested the Secretary-General of the United Nations to report on the outcome of the study undertaken by IMO, in cooperation with other competent international organizations, "to examine and clarify the role of the 'genuine link' in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels, and the potential consequences of non-compliance with the duties and obligations of flag States described in relevant international instruments" (resolution 59/24, para. 41).

3. It is noted that concerns about the "genuine link" and its relationship to the implementation of flag State obligations have also been raised in a number of other reports.[a] In response to these and other expressions of concern, a Consultative Group on Flag State Implementation, an inter-agency task force formed by the Secretary-General of the United Nations, met in 2003.

4. The Secretary-General reported to the General Assembly at its fifty-ninth session (A/59/63) on the work of the Consultative Group on Flag State Implementation responding to the request contained in resolution 58/240 for an

[a] E.g., A/54/429, paras. 181–189; A/59/298 (in particular, the recommendation with respect to illegal, unreported and unregulated fishing found in paras. 37 and 38 (a)).

elaboration of the duties and obligations of the flag State. The report has been proposed as the basic document for the discussions at the ad hoc inter-agency meeting held in July 2005, in addition to any additional input from participants.

5. Accordingly, this submission refers to the various Consultative Group on Flag State Implementation reports in document A/59/63 and expressly notes the information and views previously presented by the International Labour Organization (ILO) in section C, paragraphs 92 to 136, of that report with respect to the significance of flag State implementation for securing conditions for decent work in the maritime sector, including work on fishing vessels. The proposals for solutions, remedies and strategies, in paragraphs 135 and 136, in particular the Consensual Statement of the Meeting of Experts on Working and Living Conditions of Seafarers on board Ships in International Registers (Geneva, 6 to 8 May 2002) reproduced in paragraph 136, are specifically noted.

6. The studies and reports relating to the shipping industry and the fishing sector referred to in the ILO submission to the report of the Consultative Group on Flag State Implementation highlight the need to take account of the global nature of the shipping industry, the increasing impact of globalization on the fishing sector and, in particular, the regulatory challenges this poses for securing decent labour standards, including conditions of employment, social protection, social security and social dialogue.

7. The present submission provides additional observations on the issues to be considered at the ad hoc inter-agency meeting under three primary headings: additional observations on the role of the flag State in connection with international labour standards for the maritime and fishing sectors; the role of the "genuine link" requirement in relation to flag State duties; and comments on the consequences and potential responses to failures on the part of a flag State to carry out its responsibilities.

8. The document submitted by the secretariat of IMO on the strengthening of flag State implementation to the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting, held from 7 to 11 June 2004 (A/AC.259/11), which proposed factors to be borne in mind in a study of the means to strengthen flag State implementation within the existing framework established by the 1982 United Nations Convention on the Law of the Sea is noted, as is the IMO initiative regarding the Voluntary IMO Member State Audit Scheme and the guidance regarding recognized organizations and port State control measures.

9. The work of the other organizations concerned is noted; in particular, the United Nations Conference on Trade and Development (UNCTAD) work with respect to the conditions for registration of ships; the Food and Agriculture Organization of the United Nations (FAO) instruments addressing improved flag State control over the activities of fishing vessels, and the studies prepared by the Organization of Economic Cooperation and Development (OECD) relating to improved transparency of ownership of ships and to the elimination of substandard shipping.

10. The recent authoritative interpretations of the United Nations Convention on the Law of the Sea provided by the International Tribunal for the Law of the Sea in

connection with articles 91 and 94 and the role of the "genuine link" requirement are also noted.[b]

II. Additional observations on the role of the flag State in connection with international labour standards for the maritime and fishing sectors

11. As early as 1920,[c] ILO began developing international standards for all aspects of the working conditions for seafarers. This necessarily involved the delineation of responsibilities of its member States for seafarers working on ships registered in the member States. At that time the flag State was also usually the State of nationality/residence of the seafarer and the shipowner.

12. Article 5 of the 1958 Convention on the High Seas articulated, in general terms, the international responsibility of a State to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". In 1958, ILO adopted the Social Conditions and Safety (Seafarers) Recommendation, 1958 (No. 108) and the Seafarers' Engagement (Foreign Vessels) Recommendation, 1958 (No. 107). These Recommendations and the discussions at the Conference to adopt the Convention on the High Seas reflected the changing nature of the industry, including the emergence of States not traditionally involved in the sector. For example, Recommendation No. 108, referring specifically to the Convention on the High Seas, pointed to the fact that "labour conditions have a substantial bearing on safety of life at sea" and that "problems have been brought into special prominence by the large volume of tonnage registered in countries not hitherto regarded as being traditionally maritime". Recommendation No. 108 also expressly referred to the importance of the "genuine link" requirement set out in the Convention on the High Seas and called for implementation of "the full obligations implied by registration", namely, providing an adequate ship inspection service and ensuring that its ships conform to international safety standards; that seafarer hiring practices are regulated; that the conditions of work are in accordance with "standards generally accepted by the traditional maritime countries"; and that provision is made for freedom of association, repatriation and examination and certification of seafarer competency. These areas of flag State activity, articulated within the tripartite framework of ILO, by the international community represented at ILO at the time of adoption of the Convention on the High Seas, can be understood as elaborating the content of the flag State obligations with respect to the exercise of effective jurisdiction over ships in social and administrative matters.

13. Safety at sea and the conditions for work on board ships are even more clearly linked in article 94 of the 1982 United Nations Convention on the Law of the Sea, which replicates in part the list of items set out in Recommendation No. 108.

[b] In particular the Tribunal's decision in The M/V *Saiga* (No.2) Case (Saint Vincent and the Grenadines v. Guinea) Judgement 1 July 1999 (see http://www.un.org/depts/los/ITLOS), paras. 55-88; see also The S/V *Grand Prince* case (Belize v. France) Judgement 20 April 2001 (see http://www.un.org/depts/los/ITLOS), paras. 80-94, and other cases involving applications under article 292 of the 1982 Convention.

[c] Minimum Age (Sea) Convention, 1920 (Convention No. 7); Unemployment Indemnity (Shipwreck) Convention, 1920 (Convention No. 8); Placing of Seamen Convention, 1920 (Convention No. 9).

Article 94 (2) (b) of the 1982 Convention requires, as an aspect of effective jurisdiction and control, that every State "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship". Article 94 (3) and (4) refers to specific measures to be taken to ensure safety at sea, including, inter alia, the manning of ships, labour conditions and the training of crews, taking into account applicable international instruments under article 94 (3) (b), and under article 94 (4) (a), that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor. Article 94 (5) essentially provides the standard for these national measures in that it requires that they conform to generally accepted international regulations, procedures and practices and that the flag State take any steps that may be necessary to secure their observance.

14. In addition to the general reference to a State's responsibility for jurisdiction and control of labour conditions and social matters on ships that fly its flag, the 1982 Convention also provides a role for the flag State in connection with a number of other matters relevant to the working and living conditions of seafarers, including the right to assert jurisdiction with respect to legal proceedings in the case of marine pollution and collisions outside territorial waters; to seek enforcement of the prompt release of ships and seafarers, as provided for under article 73; and to bring an application, or authorize another entity to bring an application, for such release in the event that another State does not comply, under article 292.

15. Since 1920, ILO has adopted more than 68 instruments relating to conditions for workers in the maritime sector, including conditions on vessels engaged in the fishing industry. As noted in the report of the Consultative Group on Flag State Implementation (A/59/63, paras. 99-101), two of these instruments are strategically important to securing improved implementation of flag State obligations: the Merchant Shipping (Minimum Conditions) Convention of 1976 (Convention No. 147) and the Labour Inspection (Seafarers) Convention of 1996 (Convention No. 178).

16. Convention No. 147 was the first convention to provide for port State control measures with respect to the standards covered by the Convention. This includes the inspection and potential detention of a ship on the basis of a complaint or evidence of non-conformity with the Convention standards. A complaint can be made by a member of the crew or an organization, such as a trade union, or any other person with an interest in the safety of the ship. Convention No. 147 provides for a report of the problem to the relevant flag State and, importantly from the perspective of flag State accountability, a copy of the report may be filed with the Director-General of ILO.

17. The Labour Inspection (Seafarers) Convention, 1996 (Convention No. 178), sets out the minimum standards for a flag State maritime labour inspection system. It recognizes that there may be instances in which a ship is on the register of two countries, in which case the obligations are directed to the relevant flag State. It also includes a mechanism to help secure greater flag State accountability in that, in addition to the regular ILO reporting and supervisory mechanism (see A/59/63, para. 98), the Convention requires that the central coordinating authority in the flag State maintain a record of inspections and publish an annual report of inspection activities, including a list of any organizations that carry out inspections on its behalf. Inspectors are required to provide a copy of the inspection to the flag State

authority and to the ship's master and to post it on board for the information of seafarers, or have it sent to their representatives. The related recommendation specifies that the annual report should include statistics of ships, a list of legislation relevant to seafarers' working and living conditions, statistics on occupational health and statistics on infringements of law as well as any penalties and detentions imposed on ships.

18. As indicated in the report (A/59/63, paras. 105-109), the majority of the ILO maritime labour instruments are in the process of consolidation in two comprehensive instruments, the proposed Maritime Labour Convention of 2006 and the draft Work in Fishing Convention.

19. The proposed Maritime Labour Convention of 2006 builds upon the earlier maritime labour conventions but more clearly assigns responsibility to the flag State for all social matters on board its ships. This Convention can be seen as reflecting elements of the 2002 Consensual Declaration reproduced in paragraph 136 of the Consultative Group on Flag State Implementation report (A/59/63). The Maritime Labour Convention of 2006 has a number of objectives, including expressly providing for an effective compliance and enforcement system for social conditions on board ships and for securing a level playing field with respect to the conditions of work in this sector. Two features of the Maritime Labour Convention, as developed so far, are especially important in this respect, in that they move beyond the previous ILO maritime labour conventions and establish a system for flag State certification of specified minimum conditions on board ships.[d] The certificate system is expressly designed to work within the system for port State control, developed under the various memorandums of understanding, and well established in connection with ship safety and marine pollution and, more recently, in connection with ship security measures. However, the maritime labour documentation system has additional elements, which may better ensure both flag State implementation and enforcement and ongoing shipowner compliance with the Convention standards. First, it contains a "no more favourable treatment" clause for control activities in the ports of ratifying countries. Secondly, it would require shipowners, broadly defined as any entity that exercises the responsibilities of shipowners under the Convention, to elaborate their approach to ensuring ongoing compliance with national law implementing the Convention standards on a ship-specific basis. This is set out in a document, the Declaration of Maritime Labour Compliance, which each ship would carry. Importantly, the flag State would also be required to indicate, in the Declaration, the national legal requirements that it has adopted to implement the Convention standards. The Declaration would be attached to a certificate and would be available for inspection in foreign ports. This system is supported by complaint mechanism procedures under which seafarers or other interested entities can bring a complaint in a port regarding a breach of the standards in the Convention. This system is linked to the existing ILO supervisory mechanism through member State reporting and through a provision for filing of port State control reports on complaints and ship detentions with the Director-General of ILO. It is envisaged that a database will be set up, once the Convention is adopted, to monitor the latter reports. The Convention also puts in place mandatory standards related to the use of recognized organizations and includes standards related to the

[d] The certification system under the proposed convention would be mandatory for ships of 500 gross tonnage and above engaged in international voyages or voyages between foreign ports. It would also apply, on request by a shipowner, to other ships.

provision of financial security by shipowners for repatriation and to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard.

20. As noted in the report of the Consultative Group on Flag State Implementation (A/59/63) in paragraphs 112 to 115, a draft Work in Fishing Convention is under development. The draft, reviewed by the International Labour Conference in June 2005, is similar in its approach and concerns to the proposed Maritime Labour Convention of 2006. However, it was tailored to address the particularities of the fishing sector. It included a part specifically devoted to securing compliance with and enforcement of conditions for work on fishing vessels. It also required that a ratifying State exercise effective jurisdiction and control over vessels that fly its flag by establishing a system for ensuring compliance with the standards in the Convention, including, as appropriate, inspections, reporting, monitoring, complaint system, appropriate penalties and corrective measures. It provided for a document evidencing compliance with the national laws implementing the Convention and a complaint system and also includes a "no more favourable treatment" clause.

21. The development of a documentation system combining port State control measures for ships that do not meet international standards with a port State report to ILO on flag State responses to breaches of standards and complaints about these breaches, as well as the normal operation of the ILO supervisory system, has the potential to improve the accountability of shipowners and the responsibility of flag States to effectively exercise jurisdiction and control over ships. The inclusion of a "no more favourable treatment" clause in the proposed Maritime Labour Convention of 2006, and possibly also in a future Work in Fishing Convention, would, if adopted, help to secure a level playing field and improved working and living conditions on ships and fishing vessels.

22. It is clear, however, that the success of these legal developments will depend on securing technical cooperation to assist with training and resources for port State control personnel to carry out control measures, training for flag State inspection systems, including implementing the Maritime Labour Convention provisions regarding recognized organizations, and resources to help develop and support a database for monitoring unresolved complaints and follow-up activities.

III. Observations on the role of the "genuine link" requirement in relation to flag State duties

23. In its 1999 decision, in the case of M/V *Saiga* (No.2), the International Tribunal for the Law of the Sea stated (in para. 83) with respect to article 91 of the 1982 Convention that "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in flag States may be challenged by other States". The Tribunal pointed out (in para. 82) that "the measures that a flag State is required to take to exercise effective jurisdiction" are outlined in paragraphs 2 to 5 of article 94. However, as suggested in paragraph 14 above and reflected in table III of the report of the Consultative Group on Flag State Implementation, the range of flag State duties under the 1982 Convention is more extensive than those matters referred to in article 94, which is clearly not intended

as an exhaustive list. Certainly the elaboration of flag State duties through, inter alia, the international instruments of ILO and IMO provide specific content to the flag State duties set out under article 94.

24. The nature of the "genuine link" requirement has been the subject of legal, political and academic debate since it was first introduced in connection with ship registration in 1958 and later revisited in connection with the 1982 Convention and the development of the 1986 United Nations Convention on the Conditions for Registration of Ships, which sought, in article 3, to introduce the element of "economic matters" in connection with the "genuine link" and the areas of flag State control identified in article 94, paragraph 1 of the 1982 Convention. The latter approach has not so far received sufficient support to enter into force. It is notable that in the decision on M/V *Saiga* (No.2), the International Tribunal for the Law of the Sea held, in paragraph 65, that the determination of the criteria and establishment of procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.

25. It would appear that obtaining international agreement on the precise meaning of the "genuine link" requirement may not be the most fruitful approach to ensuring improved implementation of flag State obligations. It may be more useful, at this point, to focus on a strategic approach to securing the objective behind the "genuine link" requirement, that is, to better implement existing and emerging approaches, such as those referred to in paragraphs 19 and 20 above, to determine whether a flag State is in fact exercising its international responsibilities to effectively exercise jurisdiction and control over shipowners and ships that fly its flag. In the event that the flag State is not exercising its responsibilities, then the issue should be to determine the cause of the failure and whether, for example, it is a lack of will or a lack of capacity or both and then to seek solutions, in cooperation with other concerned agencies and organizations of shipowners and seafarers to address these problems in an effective manner.

IV. Comments on the consequences and potential responses to failures on the part of a flag State to carry out its responsibilities

26. To some extent, the problem of ships and shipowners that do not operate in accordance with international standards can be addressed by more support for and further development of the port State control regime, particularly in connection with the detentions and the development of databases and reporting systems. Developments in the ILO maritime labour and work in fishing legal instruments in connection with documentation and complaints responding to this issue at the level of both ship and flag State accountability have been outlined above and may be strategies that warrant consideration on a wider scale.

27. The more difficult legal problem lies with an effective international response to the flag State that does not take action to impose penalties on shipowners, as required under international law, or that does not respond when problems are identified on its ships. The decision of the International Tribunal for the Law of the Sea in M/V *Saiga* (No.2), in paragraph 82, took that view that article 94, paragraph 6, of the 1982 Convention provides the relevant remedy for States that have clear grounds to believe that proper jurisdiction and control have not been

exercised. If this is the full range of international legal response to a failure by flag States, then this may limit opportunities for development under the current framework of the law of the sea. It may suggest that some development of the law in this area is needed.

28. However, it is also clear that, if the full range of flag State duties in the 1982 Convention are considered, in order to effectively exercise jurisdiction, the ship, the shipowner and the seafarers must be susceptible to jurisdiction of the national legal system of the flag State, including the application of penalties. In this respect, it is noted that article 228 of the 1982 Convention also envisages situations in which the flag State loses its ability to require suspension of legal proceedings against its ships for marine pollution violations outside the territorial sea of another State. Article 228 refers to situations in which the flag State has "repeatedly disregarded its obligations to enforce effectively the international rules and standards in respect of violations committed by its vessels". It appears then, that in some circumstances, a flag State claim to primacy with respect to exercise of jurisdiction over its ship may be lost.

29. It may be that the legal system could be developed to provide that, where there is sufficient evidence of a failure by a flag State to exercise responsibilities with respect to the ships that fly its flags, it could lose its right to be considered the "flag State" with respect to the right of primary control over the ship, in matters other than marine pollution. While this may not lead to the extreme response of non-recognition of its flag by other States, it may mean that the international legal community could consider mechanisms to take action to enforce international standards. The linkages between ship safety, environmental protection, security and working conditions are increasingly well accepted.

30. Although the International Tribunal for the Law of the Sea concluded that the conditions for registration are a matter for the exclusive jurisdiction of the flag State, the question of nationality of a ship may be more complex and, as noted by the Tribunal, is a question of fact, to be determined on the basis of evidence. In its decision on M/V *Saiga* (No.2) the Tribunal noted, in paragraphs 67 and 68, the evidence adduced by Saint Vincent and the Grenadines to support its assertion that the ship was a flag ship at the relevant time. Similarly, although the Tribunal concluded that the lack of a "genuine link" could not be raised to dispute the nationality of a ship, it also concluded, in the particular case, that there was insufficient evidence that a "genuine link" did not exist. The evidence of flag State supervision and control of its ships with respect to international standards, as submitted by Saint Vincent and the Grenadines, and referred to by the Tribunal in paragraph 78 of its decision is noted.

31. It may also be possible to consider suggestions put forward, for example, by the OECD study on transparency of ship ownership, described in the report of the Consultative Group on Flag State Implementation (A/59/63, para. 187), with a view to the development of more uniformity regarding the details of registry practice, as opposed to the conditions of registry. This would complement developments in IMO in connection with the information requirements of the International Ship and Port Facility Security Code requirements for ships to carry a continuous synopsis record (para. 3, regulation 5, chapter XI, amendments to the International Convention for the Safety of Life at Sea) providing a history of the ownership and operation control over a ship. Such an approach could serve to assist flag States to better identify the

shipowners and operators over whom it is obliged to exercise jurisdiction and control without adding significant additional administrative burdens for shipowners or administrations.

32. The present submission has highlighted a number of strategies adopted by ILO and other concerned organizations that could be coordinated to better ensure observation of flag State obligations and consequently strengthen the "genuine link" between them and the ships flying their flag.

Appendix 2

Examination of the duty of flag States to exercise effective control over ships flying their flags, including fishing vessels, taking into account articles 91 and 94 of the United Nations Convention on the Law of the Sea

Note by the International Maritime Organization secretariat

Summary

The present document contains information on some specific outcomes of the work of the International Maritime Organization potentially relevant to the registration of ships.

Related documents: FSI 13/23 and MSC 80/24/Add.1

1. Under the provisions already contained in the International Maritime Organization (IMO) mandatory instruments before the entry into force of the United Nations Convention on the Law of the Sea and, later on, within the legal framework for some of the rights and obligations of the flag States, as defined in the relevant articles of the Convention (such as articles 90, 91, 92, 94 and 217), IMO conducts a comprehensive identification and review of the duties of flag States. Some of the corresponding requirements may be relevant in the context of the registration of ships and, therefore, to the consideration of "genuine link"-related matters.

2. Recently, IMO has developed the draft Code for the implementation of mandatory IMO instruments (MSC 80/24/Add.1, annex 9) and the framework and procedures for the Voluntary IMO Member State Audit Scheme, expected to be adopted at the next IMO Assembly, this year. The purposes served by the above-mentioned Code are twofold. The Code is intended to serve as the audit standard for the Audit Scheme and to guide member States in the implementation of mandatory IMO instruments.

3. On the specific processes associated with the identification and verification of some of the substantial elements relating to the registration of ships, IMO has developed two numbering schemes: the IMO Ship Identification Number Scheme (resolution A.600(15) and circular letter no. 1886/Rev.2) and the IMO Unique Company and Registered Owner Identification Number Scheme (resolution MSC.160(78) and circular letter no. 2554), which became mandatory under International Convention for the Safety of Life at Sea regulations XI-1/3 and 3-1, respectively.

4. The IMO Ship Identification Number Scheme relates to the unique identification of all passenger ships of 100 gross tonnage and upwards and of cargo ships of 300 gross tonnage and upwards, covered by the International Convention for the Safety of Life at Sea, throughout their lifetime. It is based on the allocation

of a seven-digit number, preferably at the occasion of the keel-laying, which would appear on the ships and their certificates.

5. The IMO Unique Company and Registered Owner Identification Number Scheme relates to the unique identification of the company and registered owner by the allocation of a seven-digit number. When allocated, the number should appear on the ship management-related certificates, as required by the International Safety Management Code, for all passenger ships, including passenger high-speed craft, and for all cargo ships and mobile offshore drilling units of 500 gross tonnage and upwards, covered by the International Convention for the Safety of Life at Sea. It should also appear on the continuous synopsis record, which is intended to provide an on-board record of the history of the ship with respect to information related to, among others, the registered owner(s), the registered bareboat charterer(s) and the company, for all ships covered by chapter I of the International Convention for the Safety of Life at Sea.

6. The question of the registration of ships was also addressed in IMO Assembly resolution A.923(22) on measures to prevent the registration of "phantom" ships.

7. Concerning operations taking place on the occasion of the transfer of ships between flags, the Organization developed guidelines (MSC/Circ.1140-MEPC/Circ.424) aimed at enhancing the transparency of the condition of the ship at the time when such operations take place.

8. Furthermore, another draft recommendatory instrument was recently prepared in the form of an MSC/MEPC circular (FSI 13/23, annex 13) which complements the mandatory provisions contained in resolution A.739(18) on guidelines for the authorization of organizations acting on behalf of the administration in addressing the issue of transfer of class. These draft provisions are aimed at ensuring the adequacy of the work performed by organizations authorized to act on behalf of flag administrations, by identifying the obligations and reporting mechanisms of the losing and gaining recognized organizations.

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Appendix 3

Activities relevant to the strengthening of flag State jurisdiction undertaken by the organizations participating in the Meeting[a]

I. International Maritime Organization

1. The *Prestige* oil spill in European waters has rekindled political interest in the transport of oil and has led to a number of substantive safety and environmental initiatives by IMO member States for reducing the risks of accidents as well as their environmental impact on the oceans, on local communities, on tourism and on fishing industries. The safety record of the oil transport industry with respect to seaborne trade has improved significantly in the past decade as a result of the instruments and treaties that have been adopted by IMO and the recognition by the major players in the industry of their responsibilities. However, the impact of a single major oil spill can have devastating effects. The members of IMO have therefore taken a very strong position with regard to further reducing the risks and promoting clear accountability of flag States. Their programme of work for achieving these objectives is ambitious.

2. The role of IMO in connection with the implementation by flag States of duties in accordance with article 94 of the United Nations Convention on the Law of the Sea should be seen as pre-eminent: IMO has an exclusive mandate to adopt safety and anti-pollution regulations applicable on board ships. Most IMO technical rules are self executing; as such, they have been written to implement directly the framework principles of safety and prevention of marine pollution contained in the Convention.

3. The present paper summarizes the main features of the mandate of IMO in accordance with the Convention and, as agreed at the Paris meeting, a summary of the main activities undertaken to enhance the efficiency of flag State implementation. It also includes reference to cooperation between IMO and other organizations within the United Nations system.

A. Implementation through International Maritime Organization rules of the flag State's duties as prescribed by the United Nations Convention on the Law of the Sea

4. Since 1959, IMO, the sole United Nations specialized agency exclusively devoted to maritime affairs, has been elaborating comprehensive multilateral treaties imposing primarily upon the flag State a wide range of technical measures designed to improve the safety of shipping and enhance the prevention of marine pollution from vessels. It should also be noted that measures of port State control are also regulated in IMO treaties aimed at preventing and correcting deficiencies in the exercise of flag State jurisdiction.

[a] Updated version of the information provided in A/59/63.

5. The most important IMO treaties are implemented worldwide by States representing together between 95 and 99 per cent of the world's merchant fleet tonnage.

6. Beginning in 1973, the secretariat of IMO (then the Inter-Governmental Maritime Consultative Organization (IMCO)) actively contributed to the work of the Third United Nations Conference on the Law of the Sea in order to ensure that the elaboration of IMO instruments conformed with the basic principles guiding the elaboration of the future Convention. Although IMO is explicitly mentioned in only one of the articles of the United Nations Convention on the Law of the Sea (article 2 of annex VIII), several provisions in the Convention refer to the adoption by the "competent international organization" of international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from vessels and by dumping.

7. The articles and provisions of the Convention that are of particular relevance in this context include the following:

(a) Article 21(2), which refers to the "generally accepted international rules or standards" on the "design, construction, manning or equipment" of ships in the context of laws relating to innocent passage through the territorial sea; article 211(6)(c), which refers to the "generally accepted international rules and standards" in the context of pollution from vessels; articles 217(1) and (2), which refer to the "applicable international rules and standards" in the context of flag State enforcement; and article 94(3), (4) and (5), which requires flag States to conform to the "generally accepted international regulations, procedures and practices" governing, inter alia, the construction, equipment and seaworthiness of ships, as well as the manning of ships and the training of crews, taking into account "applicable international instruments";

(b) Articles 21(4), 39(2) and, by extension, 54, which refer to "generally accepted international regulations" in the context of the prevention of collisions at sea;

(c) Articles 22(3)(a), 41(4) and 53(9), which refer to the "recommendations [or proposals] of the competent international organization" (i.e., IMO) in the context of the designation of sea lanes, the prescription of traffic separation schemes and their substitution;

(d) Article 23, which refers to the requirements in respect of documentation and special precautionary measures established by international agreements for foreign nuclear-powered ships and ships carrying nuclear or inherently dangerous or noxious substances;

(e) Article 60 which refers to the "generally accepted international standards established ... by the competent international organization" (i.e., IMO) for the removal of abandoned or disused installations or structures to ensure safety of navigation (para. 3); the "applicable international standards" for the determination of the breadth of the safety zones; the "generally accepted standards or recommendations" of the "competent international organization" (i.e., IMO) where the breadth exceeds a distance of 500 metres (para. 5); and the "generally accepted international standards" regarding navigation in the vicinity of artificial islands, installations, structures and safety zones (para. 6) (by extension, article 80 can be understood to also refer to these items).

(f) Article 94(3), (4), and (5), which regulates the duties of flag States, article 39(2), which concerns the duties of ships in transit passage, which refer to the "generally accepted international regulations, procedures and practices" for safety at sea and for the prevention, reduction and control of pollution from ships (by extension, article 54 can be understood to also refer to these items);

(g) Article 210(4) and (6), which refers to the "global rules, standards, and recommended practices and procedures" for the prevention, reduction and control of pollution by dumping, and article 216(1), which refers to the enforcement of such "applicable international rules and standards established through competent international organizations or diplomatic conference";

(h) Article 211, which refers to the "international rules and standards" established by "States acting through the competent international organization" (para. 1) and "generally accepted international rules and standards established through the competent international organization" (paras. 2 and 5) for the prevention, reduction and control of pollution of the marine environment from vessels; articles 217(1) and (2), 218(1) and (3), and 220(1), (2) and (3), dealing with enforcement of anti-pollution rules, which refer to the "applicable international rules and standards"; and articles 217(3) and 226(1), which refer to the certificates (records and other documents) required by international rules and standards in the context of pollution control;

(i) Article 211(6)(a), regarding pollution from vessels, which refers to such "international rules and standards or navigational practices as are made applicable, through the [competent international] organization [IMO], for special areas";

(j) Article 211(7), which requires such "international rules and standards" to include, inter alia, those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges, or probability of discharges;

(k) Articles 219 and 226(1)(c), which refer to "applicable international rules and standards" relating to seaworthiness of vessels; and article 94(5), which refers to "generally accepted international regulations, procedures and practices" governing seaworthiness of ships.

8. The basic obligations imposed upon the flag State are contained in article 94 of the United Nations Convention on the Law of the Sea, which requires flag States to take measures to ensure safety at sea that conform to "generally accepted international regulations, procedures and practices" (article 94(3), (4) and (5)). Several IMO safety instruments include provisions that are also aimed at preventing and controlling pollution hazards posed by maritime accidents involving ships. In these provisions, the management of safety and pollution risks are interconnected. Other IMO instruments exclusively regulate anti-pollution measures, irrespective of whether the introduction of polluting substances into the sea is the result of an accident involving a ship or from the operational discharges from vessels. Those instruments have proved to be an effective vehicle for the implementation of article 217 of the Convention, which provides for the basic obligations imposed upon the flag State to ensure compliance by its vessels with applicable international rules and standards established through the competent international organization or general diplomatic conference.

9. The most significant and widely accepted IMO safety and anti-pollution treaties providing for measures to ensure the effective implementation of the United Nations Convention on the Law of the Sea safety and anti-pollution shipping obligations are the following:

- International Convention for the Safety of Life at Sea, 1974, and the Protocols of 1978 and 1988 relating thereto
- International Convention on Load Lines, 1966, and the Protocol of 1988 relating thereto
- International Convention on Tonnage Measurement of Ships, 1969
- Convention on the International Regulations for Preventing Collisions at Sea, 1972
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978
- International Convention on Maritime Search and Rescue
- International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 related thereto
- International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001 (not yet in force)
- International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (not yet in force)

B. Voluntary Member Audit Scheme

10. The exercise of flag State jurisdiction on technical matters related to safety of navigation and prevention of marine pollution is exclusively within the mandate of IMO. Since the inception of its activities, IMO has continuously reaffirmed its mandate in this regard through the development of treaties and initiatives that have resulted in the strengthening of flag State implementation, up to the point that almost all technical rules and regulations applicable on board ships engaged in commercial navigation worldwide are binding and self executing through provisions contained in IMO treaties and codes.

11. The Assembly of IMO, at its 24th session, held from 21 November to 2 December 2005, adopted resolution A.974(24), on a framework and procedures for a voluntary audit scheme to achieve harmonized and consistent global implementation of IMO safety and anti-pollution rules and standards. The scheme addresses issues such as the conformance of a member State in enacting appropriate legislation for the IMO instruments to which it is a Party; the administration and enforcement of the applicable laws and regulations of the member State; the delegation of authority in terms of the implementation of convention requirements; and the control and monitoring mechanism of the member State's survey and certification processes and of its recognized organizations.

12. It will help to identify where capacity-building activities would have the greatest effect and will also enable appropriate action to be much more precisely focused. Individual member States that volunteer to be audited will receive valuable

feedback, and, on a wider scale, generic lessons learned from audits could be provided to all member States so that the benefits may be shared. The regulatory process at IMO may also benefit from the results of this learning experience.

13. Alongside the audit scheme framework and procedures, the Assembly adopted resolution A.973(24), containing a Code for the implementation of mandatory IMO instruments, which will provide the audit standard. By a further resolution (A.975(24)), on future development of the Voluntary IMO Member State Audit Scheme, the Assembly requested the two main deliberating bodies of IMO, namely, the Maritime Safety Committee and the Marine Environment Protection Committee, to review the future feasibility of including, within the scope of the audit scheme, maritime security-related matters and other functions not presently covered and to identify any implications of broadening the scope of the audit scheme. The IMO Council was requested to develop suitable provisions for the possible future inclusion of other issues (relating to safety, environmental protection and security) in the audit scheme, taking into account the experience gained from the implementation of the scheme.

14. Enforcement of IMO safety and anti-pollution provisions has been strengthened by the incorporation into the International Convention on the Safety of Life at Sea of the International Safety Management Code, under which companies operating ships are subject to a safety management system under the control of the administration of the flag State.

C. Work of the International Maritime Organization on strengthening flag State jurisdiction in the implementation of International Maritime Organization conventions

15. As a result of the worldwide implementation of IMO regulations, the casualty rate for all types of merchant ships has plummeted over successive decades. In terms of average annual loss rates per million flight, or voyage, hours at risk, the loss rate for commercial aircraft is three times that for merchant ships, and, since 1988, the merchant ship loss rate per 1,000 units at risk has been consistently lower than the rate for commercial aircraft.

16. The response of IMO to serious accidents has been swift and decisive, and its current proactive policy has created a regulatory infrastructure that covers everything from measures designed to prevent casualties and accidents and minimize damage to the environment to measures aimed at ensuring an effective response when accidents do happen, to the compensation regime, which ensures that the innocent victims of pollution and other mishaps receive adequate recompense.

17. The IMO Subcommittee on Flag State Implementation was set up in 1992 following the recognition by the Maritime Safety Committee and the Marine Environment Protection Committee of the urgent need to improve maritime safety and the prevention of marine pollution through a stricter and more uniform application of existing regulations, in the wake of the *Herald of Free Enterprise*, *Scandinavian Star*, *Doña Paz* and *Exxon Valdez* accidents, among others. Incidents such as the *Erika* and the *Prestige* oil spills have reinforced the importance of the Subcommittee's activities. Its primary objective is the identification of measures necessary to ensure effective and consistent global implementation of IMO

regulations, including the consideration of special difficulties faced by developing countries. There was agreement that the effectiveness of IMO safety and pollution prevention instruments depends primarily on the application and enforcement of their requirements by the States parties and that many have experienced difficulties in complying fully with the provisions of the instruments.

18. To meet its primary objective, the Subcommittee was assigned the following terms of reference.

19. Under the direct instructions of the Maritime Safety Committee and the Marine Environment Protection Committee, the Subcommittee on Flag State Implementation, in addressing the effective and consistent global implementation and enforcement of IMO instruments concerning maritime safety and security and the protection of the marine environment, will consider matters related to the following subjects, including the development of any necessary amendments to relevant conventions and other mandatory and non-mandatory instruments and the preparation of new mandatory and non-mandatory instruments, guidelines and recommendations, for consideration by the committees, as appropriate:

(a) Comprehensive review of the rights and obligations of States emanating from the IMO treaty instruments;

(b) Assessment, monitoring and review of the current level of implementation of IMO instruments by States in their capacity as flag, port and coastal States and countries training and certifying officers and crews, with a view to identifying areas in which States may have difficulties in fully implementing IMO instruments;

(c) Identification of the reasons for the difficulties identified in (b) above, taking into account any relevant information collected through, inter alia, the assessment of performance, the investigation of marine casualties and incidents and the in-depth analysis of port State control activities, while paying particular attention to the perceived difficulties faced by developing countries;

(d) Consideration of proposals to assist States in implementing and complying with IMO instruments. Such proposals could be implemented by States or by IMO in a harmonized and coordinated manner and could include the development of any necessary amendments to relevant conventions and other mandatory and non-mandatory instruments and the preparation of new mandatory and non-mandatory instruments, guidelines and recommendations, for consideration by the committees, as appropriate;

(e) Development and maintenance of a system for the analysis of investigations into marine casualties and incidents, with a view to putting in place an efficient and comprehensive knowledge-based mechanism to support the identification of trends and the IMO rule-making process;

(f) Review of IMO standards on maritime safety and security and the protection of the marine environment, with a view to maintaining updated and harmonized guidance on survey and certification-related requirements;

(g) Development and maintenance of a framework to promote the global harmonization and coordination of port State control activities; and

(h) Consideration of and action on any recommendations or instructions from IMO bodies related to the work of the Subcommittee.

20. Since its creation, the Subcommittee has progressively discharged its mandate and produced important guidelines and recommendations. Some have been adopted as resolutions by the IMO Assembly, Maritime Safety Committee and Marine Environment Protection Committee, while others have taken the form of circulars. The Assembly resolutions adopted as a result of the work of the Subcommittee on Flag State Implementation include:

- A.739(18) on guidelines for the authorization of organizations acting on behalf of the administration
- A.740(18) on interim guidelines to assist flag States
- A.741(18) on an international management code for the safe operation of ships and for pollution prevention
- A.742(18) on procedures for the control of operational requirements related to the safety of ships and pollution prevention
- A.787(19) on procedures for port State control
- A.788(19) on guidelines on implementation of the International Safety Management Code by administrations
- A.789(19) on specifications on the survey and certification functions of recognized organizations acting on behalf of the administration
- A.847(20) on guidelines to assist flag States in the implementation of IMO instruments
- A.848(20) on implementation of the International Safety Management Code
- A.849(20) on a code for the investigation of marine casualties and incidents
- A.881(21) on self-assessment of flag State performance
- A.882(21) on Amendments to the Procedures for Port State Control (resolution A.787(19))
- A.884(21) on Amendments to the Code for the investigation of marine casualties and incidents (resolution A.849(20))
- A.912(22) on self-assessment of flag State performance
- A.914(22) on measures to further strengthen flag State implementation
- A.948(23) on revised survey guidelines under the harmonized system of survey and certification
- A.973(24) on the code for the implementation of mandatory IMO instruments, which is standard for the Voluntary IMO Member State Audit Scheme (revokes resolution A.847(20))

21. As a result of the work of the Subcommittee on Flag State Implementation, the Maritime Safety Committee recently adopted the following resolutions:

- MSC.160(78) on adoption of the IMO unique company and registered owner identification number scheme

- MSC 208(81) on adoption of amendments to the guidelines for the authorization of organizations to act on behalf of the administration (resolution A.739(18)), concerning the specific issue of the use of exclusive surveyors

22. The Maritime Safety Committee and Marine Environment Protection Committee circulars produced as a result of the Subcommittee's work include the following:

- MSC/Circ.620 on amendments to resolution A.466(XII) on procedures for the control of ships
- MSC/Circ.630 on procedures for the control of ships — information on available inspection services
- MSC/Circ.710-MEPC/Circ.307 on a model agreement for the authorization of organizations acting on behalf of the administration
- MSC/Circ.753 on the report on fishing vessels and fishermen statistics
- MSC/Circ.772-MEPC/Circ.319 on guidelines for the development and approval of reporting requirements in non-mandatory instruments and reports
- MSC/Circ.788 on authorization of recognized organizations acting on behalf of administrations
- MEPC/Circ.325-MSC/Circ.802 on provision of preliminary information on serious and very serious casualties by MEPC/Circ.332 rescue coordination centres
- MSC/Circ.953-MEPC/Circ.372 on reports on marine casualties and incidents — revised harmonized reporting procedures — reports required under International Convention on the Safety of Life at Sea regulation I/21 and MARPOL 73/78 articles 8 and 12
- MSC/Circ.889-MEPC/Circ. 353 on self-assessment of flag State performance
- MSC/Circ.890-MEPC/Circ.354 on interim guidelines for port State control related to the International Safety Management Code
- MSC/Circ.1052-MEPC/6/Circ.8 on national contact points for safety and pollution prevention
- MSC/Circ.954-MEPC/Circ.373 on self-assessment of flag State performance: criteria and performance indicators
- MSC/Circ.955 on servicing of life-saving appliances and radiocommunication equipment under the harmonized system of survey and certification
- MSC/Circ.956 on guidelines for unscheduled inspections of ro-ro passenger ships by flag States
- MSC/Circ.1010-MEPC/Circ.382 on communication of information on the authorization of recognized organizations
- MSC/Circ.1011-MEPC/Circ.383 on measures to improve port State control procedures with a view to establishing a mechanism for a constructive and timely dialogue between flag States and port States on port State control interventions through improved channels of communication between port States and flag States

- MSC/Circ.1058-MEPC/Circ.400 on interim guidelines to assist flag States and other substantially interested States to establish and maintain an effective framework for consultation and cooperation in marine casualty investigations

  MSC/Circ.1140-MEPC/Circ.424 on transfer of ships between States

- MSC-MEPC.5/Circ.2 on guidelines for administrations to ensure the adequacy of transfer of class related matters between recognized organizations

- MSC-MEPC.6/Circ.2 on national contact points responsible for safety and pollution prevention

D. Review and analysis of casualty and port State control-related data

23. The Subcommittee is the body that established a scheme for the review and analyses of casualty and port State control-related data. In this context, the Assembly agreed to grant intergovernmental organization status to eight port State control regimes as a result of which port State control activities could be further harmonized and coordinated in an enhanced spirit of cooperation between flag States and port States. In support of this work and the work of other IMO bodies, IMO has developed the IMO Global Integrated Shipping Information System, which is an Internet-based integration of various databases, six modules of which are already publicly available dealing with: International Ship and Port Facility Security Code/security; casualty; recognized organizations; condition assessment scheme (for single hull tankers); port reception facilities; and piracy and armed robbery against ships. The system allows member States to enter data directly in order to comply with existing reporting requirements contained in international instruments.

E. Safety of fishing vessels and fishermen

24. Taking into account the highly worrying situation of the safety of fishing vessels and fishermen in the absence of international instruments in force, the Subcommittee is pursuing the matter of the cooperation between IMO and FAO on the question of illegal, unregulated, unreported fishing, and, in this context, a second joint working group meeting is scheduled to take place next year, during which further efforts will be made to ensure the entry into force of the Torremolinos Protocol and the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel in the near future.

II. Food and Agriculture Organization of the United Nations

A. Introduction

25. The work of the Food and Agriculture Organization of the United Nations (FAO) focuses on fishing vessels and their operations and the promotion of responsible fisheries. This also involves encouraging flag States to ensure effective control over their fishing vessels, including by taking actions to prevent, deter and eliminate illegal, unreported and unregulated fishing. To this end, several actions were undertaken and numerous global, regional and national forums, both

programmed and ad hoc, were convened in 2004 and 2005 under the auspices of FAO. These actions included monitoring and promoting effective implementation of the Code of Conduct for Responsible Fisheries, related technical guidelines and the international plans of action, particularly the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Most notable of the forums was the FAO ministerial meeting on 12 March 2005, which adopted the 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing.[b]

B. 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

26. Pursuant to article III.3 of the Compliance Agreement, the actions pursued by flag States to ensure compliance with international conservation and management may include refusal by the flag State to allow a fishing vessel to fish on the high seas if it considers, taking into account the links it has with the vessel, that it will not be able to exercise effective control over such vessel and the flag States' responsibilities under the Agreement. The Agreement leaves it to the parties to determine what kind of link the high seas fishing vessel ought to have with the flag State. The criterion of the "genuine link", as referred to in article 91 of the 1982 United Nations Convention on the Law of the Sea, is not elaborated in this context.

27. The reference to "links" in article III.3 of the Agreement, read in the context of ensuring effective exercise of flag State control, has served as the basis of much of the FAO work on flag State implementation since 1993. In this regard, FAO encourages the flag State to examine how to use its various links with the fishing vessel and to promote different ways that the flag State can exercise effective control over its vessels to prevent, deter and eliminate illegal, unreported and unregulated fishing.

28. As the Agreement is an integral part of the Code of Conduct for Responsible Fisheries, many of the actions taken by FAO and its members in 2004 and 2005 for implementation of the Agreement were through broader actions towards implementation of the Code and related international plans of action, as reported below. However, certain specific initiatives directly linked to implementation of the Agreement were:

(a) Maintenance of the high seas fishing vessel record in the FAO Fisheries Department (ongoing) and the examination of ways to improve this record. Related to this is the recommendation of the twenty-sixth session of the FAO Committee on Fisheries for the establishment within FAO of a global record of fishing vessels;

(b) Provision of assistance to members to develop national legislative frameworks to implement the Agreement;

(c) Collaboration with partners in convening a global enforcement training workshop and in providing information on monitoring, control and surveillance including vessel-monitoring systems, in regional workshops;

[b] The information on FAO initiatives relating to flag State implementation provided herein is selective. It is not an exhaustive account of all relevant activities of FAO. It provides an overview of the main FAO initiatives that may be used as references for further research.

(d) Published papers, studies and reports relating to better implementation of flag State responsibilities.

C. 1995 Code of Conduct for Responsible Fisheries

29. The 1995 Code of Conduct for Responsible Fisheries continues to be one of the most popular of the current international fisheries instruments due mainly to its use as a reference point by States and regional fisheries management organizations for elaborating policies, strategies and regulations for responsible fisheries.

30. Article 4 of the Code states, inter alia, that FAO will report to the Committee on Fisheries concerning the implementation of the Code. The fourth report on the implementation of the Code submitted to the Committee at its twenty-sixth session, in 2005, reported that FAO fully supports the effective implementation of the Code and that this activity ranks high in the fisheries programme of work and covers all aspects of it.

31. The major FAO activities for the implementation of the Code that may be considered most directly related to flag State implementation include the holding of expert and technical consultations on open registries, illegal, unreported and unregulated fishing, data formats and procedures for monitoring, control and surveillance and fleet capacity; and national and subregional workshops on the international plans of action, in particular the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and vessel-monitoring systems.

32. It should be noted that many activities relating to the Code are associated with implementation of the International Plan of Action, including through the use of the technical guidelines on implementation of the International Plan of Action. National and subregional workshops on the International Plan of Action were also held to help States develop their national plans of actions to deter, prevent and eliminate illegal, unreported and unregulated fishing. The FAO consultations and regional and national initiatives to this end are elaborated in the following section.

D. International plans of action and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

33. At the request of the Committee on Fisheries at its twenty-sixth session, several consultations were held in order to, inter alia, further strengthen the implementation of the 1995 Code of Conduct for Responsible Fisheries and the international plans of action. Of general relevance to the implementation of international plans of action was the Technical Consultation to Review Progress and Promote the Full Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the International Plan of Action for the Management of Fishing Capacity, held in June 2004. The Consultation suggested a number of actions to promote further the implementation of both of these International Plans of Action. At the conclusion of its work, the Consultation adopted a set of recommendations that have a strong focus on illegal, unreported and unregulated fishing.

34. A significant consultation relating to flag State implementation was the Expert Consultation on Data Formats and Procedures for Monitoring, Control and Surveillance held in Bergen, Norway, from 25 to 27 October 2004. The Consultation was convened with a view to facilitating implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. It focused on the harmonization of data formats for monitoring, control and surveillance information that is exchanged internationally. Background papers for the Consultation covered topics including vessel-monitoring systems' reporting procedures; licences and fishing authorizations; exchange of catch certificates and trade documents; electronic fishing logbooks; progress made by the Coordinating Working Party on Fishery Statistics; and the use of customs tariff codes; and linkages with traceability and eco-labelling. The discussion following the presentations led to the adoption of several recommendations for more effective harmonization and exchange of monitoring, control and surveillance information. The Consultation emphasized that an efficient path to standardized data formats would be the use of existing and developing data sets from the Coordinating Working Party on Fishery Statistics. The Consultation recommended, inter alia, that the Working Party be encouraged to establish a formal process for proposing and advising on standards and formats for the exchange of monitoring, control and surveillance data, in particular where such data have not been the subject of previous Working Party recommendations. The Consultation recommended that the Working Party should consider adopting the North Atlantic Format as a model for the standard for exchange of a range of monitoring, control and surveillance data and communications. In addition, the Working Party, in coordination with regional fisheries management organizations and other stakeholders, should continue efforts to standardize field codes and formats for data in vessel databases. Other recommendations addressed the use of the United Nations Code for Trade and Transport Locations for specifying locations, the introduction of standard codes for communication of information on vessel authorizations to fish and the need to specify codes for exchange of information on defined violations.

35. Another consultation complementary to flag State implementation was the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing held in Rome in August and September 2004. The Consultation addressed issues relating to the role of the port State in combating illegal, unreported and unregulated fishing and to address principles and guidelines for the establishment of regional memorandums on port States measures to prevent, deter and eliminate illegal, unreported and unregulated fishing. It approved a Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing. It also supported the setting up of a programme of assistance to promote the implementation of port State measures to combat illegal, unreported and unregulated fishing and supported the establishment of a database concerning relevant port State measures.

36. Most relevant to flag State implementation was the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing that was held at the Southeast Fisheries Science Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, in Miami, Florida, United States of America, from 23 to 25 September 2003. The Expert Consultation was convened through the FAO FishCode programme with a view to facilitating implementation of the International

Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The Consultation focused on the effects of illegal, unreported and unregulated fishing on global fishery resources and on lessons that might be learned from the experiences of flag States that have already implemented tighter control over the activities of their fishing vessels. Background papers for the Consultation covered topics such as a global assessment of the extent of illegal, unreported and unregulated fishing; fishing vessels operating under open registries and the exercise of flag State responsibility; standards relating to flag State responsibility over fishing vessels contained in recent international instruments; and the International Network for the Cooperation and Coordination of Fisheries-Related Monitoring, Control and Surveillance Activities. Case study presentations were also made by experts from selected open registry countries and areas (Cook Islands, Cyprus and Panama). Discussions following the presentations led to the adoption of a number of recommendations for more effective application of flag State control over fishing vessels, particularly those operating under open registries, as a means to reduce the incidence of illegal, unreported and unregulated fishing.

37. The Committee on Fisheries, in commending FAO efforts at its twenty-sixth session, endorsed the reports and recommendations of the consultations referred to above and agreed that follow-up work to the consultations should be undertaken.[a]

38. Another FAO initiative directly linked to flag State implementation was a series of four regional workshops on vessel-monitoring systems, respectively covering the South-West Indian Ocean, Central America, the Caribbean and South-East Asia. The workshops were organized and implemented in succession from September 2003 to October 2004 by the FAO Fishing Technology Service and the FishCode programme. They extend the series that commenced in October 2002 with a workshop covering parts of West Africa. All workshops were intended to promote the use of vessel-monitoring systems as an additional instrument for the management of fisheries, both at the national level and in cooperation with regional fishery bodies. They comprise one aspect of the larger set of FAO activities to implement the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

39. A noteworthy development in 2005 was the adoption of the Rome Declaration on Illegal, Unreported and Unregulated Fishing by the FAO ministerial meeting on 12 March 2005, which, inter alia, reaffirms the commitment to enhance responsible and effective fisheries management, to prevent, deter and eliminate illegal, unreported and unregulated fishing and to strengthen, improve and, where appropriate, establish monitoring, control and surveillance programmes including vessel-monitoring systems. The Rome Declaration is attached at the end of this report.

[a] The other consultations that are indirectly related to flag State implementation are reported under "FAO Technical guidelines on responsible fisheries" and "Other relevant work undertaken by FAO".

E. Food and Agriculture Organization of the United Nations Technical Guidelines on Responsible Fisheries

40. A number of FAO technical guidelines in support of the implementation of the 1995 Code of Conduct for Responsible Fisheries were published in 2004 and 2005. These guidelines do not relate directly to flag State implementation issues but are relevant in some respects in the context of management measures that are established in accordance with these guidelines and with which fishing vessels may have to comply.

41. The relevant FAO technical guidelines published recently are:

- "Guidelines for the ecolabelling of fish and fishery products from marine capture fisheries", FAO, Rome (2005)
- "Increasing the contribution of small-scale fisheries to poverty alleviation and food security", FAO Technical Guidelines for Responsible Fisheries No. 10, FAO, Rome
- "The Ecosystem Approach to Fisheries", FAO Technical Guidelines for Responsible Fisheries No. 4, Suppl. 2., FAO, Rome (2003)

F. Other relevant work undertaken by the Food and Agriculture Organization of the United Nations

42. In addition to the technical guidelines in support of the implementation of the 1995 Code of Conduct for Responsible Fisheries, FAO members adopted the Strategy for Improving Information on Status and Trends of Capture Fisheries in June 2003. The Strategy was endorsed by the United Nations General Assembly later that same year. It is a voluntary instrument that applies to all States and entities. Its overall objective is to provide a framework, strategy and plan for the improvement of knowledge and understanding of fishery status and trends as a basis for fisheries policymaking and management for the conservation and sustainable use of fishery resources within ecosystems. It sets out the objective, the guiding principles and the required actions for improving information on status and trends of capture fisheries. Global implementation of the Strategy is being promoted through the FishCode Strategy for Improving Information on Status and Trends of Capture Fisheries Project, which became operational in November 2004.

43. The June 2004 technical consultation on the use of subsidies in the fisheries sector, which considered the effect of subsidies on fisheries resources, was a complementary activity to flag State implementation. The consultation recommended that FAO continue to work on issues related to fisheries subsidies. The consultation also agreed that FAO should, in the short term, broadly examine the relationship between subsidies and overcapacity and illegal, unreported and unregulated fishing. The long-term work was identified as evaluating the impact of fisheries subsidies on the various fisheries management regimes.

44. Other relevant issues that were raised at the twenty-sixth session of the Committee on Fisheries included marine protected areas and fisheries. The session agreed, inter alia, that the use of marine protected areas as a fisheries management tool should be scientifically based and backed by effective monitoring and

enforcement and an appropriate legal framework and that, as one of a number of management tools, they would be effective in combination with other appropriate measures such as capacity control. It was stressed that FAO should collaborate with other international intergovernmental organizations working on the topic, in particular the Convention on Biological Diversity and the United Nations General Assembly.

45. The Committee also discussed the issue of deep-sea fisheries. It noted the challenges that the management of deep-water demersal fisheries posed, both on the high seas and where they occurred in exclusive economic zones, owing to the vulnerable biological characteristics of deep-water demersal fishes compounded by concerns about the conservation of biodiversity in deep-sea habitats. The Committee also took note of concerns about the deficiencies in the existing legal and institutional framework for deep-sea fisheries and endorsed proposed future FAO activities on deep-sea fisheries issues.

46. The attention of the Committee was also drawn to the revised Code of Safety for Fishermen and Fishing Vessels and the Voluntary Guidelines for the Design, Construction and Equipment of Small Fishing Vessels that had been prepared by FAO, ILO and IMO. The Committee welcomed the revised Code and Voluntary Guidelines and recommended the early publication by IMO of these documents.

G. Other meetings and activities of relevance to the issue of flag State responsibilities

47. FAO, in monitoring and analysing trends in implementation of vessel-monitoring systems and catch documentation, noted that 113 countries signatories to regional fishery bodies have or are considering implementing vessel-monitoring systems. These countries account for 95 per cent of the vessels listed in the Lloyds database (i.e., over 100 tons). It was also noted that catch certification and trade documentation is denying the access of tuna and toothfish caught by illegal, unreported and unregulated fishing vessels to the markets of North America, Europe and Japan.

48. The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing, adopted by the FAO ministerial meeting on 12 March 2005, inter alia, calls for the following measures directly related to flag State responsibilities:

(a) Consideration by fisheries policymakers and managers of the full range of available monitoring, control and surveillance options, strategies and tools; the taking of necessary actions to fully implement the international plans of action and any applicable monitoring, control and surveillance measures adopted by relevant regional fisheries management organizations and the understanding, by fishers, of their role in monitoring, control and surveillance;

(b) Requirement by flag States that all large-scale fishing vessels operating on the high seas be fitted with vessel-monitoring systems no later than December 2008, or earlier if so decided by their flag State or any relevant regional fisheries management organizations;

(c) Development of a comprehensive global record of fishing vessels within FAO, including refrigerated transport vessels and supply vessels, that incorporates

available information on beneficial ownership, subject to confidentiality requirements in accordance with national law;

(d) Work within regional fisheries management organizations to facilitate, where appropriate, exchange of vessel-monitoring systems and observer data, subject to confidentiality requirements in accordance with national law and supplementation of existing monitoring, control and surveillance schemes through measures such as encouraging the fishing fleet to report any suspected illegal, unreported and unregulated fishing activities they observe;

(e) Further international action to eliminate illegal, unreported and unregulated fishing by vessels flying "flags of convenience" as well as requirement that a "genuine link" be established between States and fishing vessels flying their flags;

(f) Full implementation of vessel-marking requirements in accordance with the FAO Standard Specification and Guidelines for the Marking and Identification of Fishing Vessels and any applicable regional fisheries management organizations requirements;

(g) Fulfilment by all States that are parties to the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of their obligations to submit to FAO, for inclusion in the High Seas Vessel Authorization Record, data on vessels entitled to fly their flags that are authorized to be used for fishing on the high seas, submitted by those that are not yet parties to the 1993 FAO Agreement of such data on a voluntary basis and of detailed information on fishing vessels flying their flag to relevant regional fisheries management organizations, in accordance with the requirements adopted by those regional fisheries management organizations; and establishment of such requirements within regional fisheries management organizations where they do not yet exist.

49. In relation to the ministerial directive for a global record of fishing vessels to be developed within FAO, a study is being undertaken by FAO on the setting up of such a record.

Other activities of relevance under the FishCode programme

50. Where FAO initiatives relate to the implementation of the 1995 Code of Conduct for Responsible Fisheries, they often involve FishCode[a] support, including through collaboration, coordination, sponsorship and publishing. Many such initiatives are already documented in the previous sections of the present report.

51. Some of the notable initiatives relating to flag State implementation with FishCode involvement include:

(a) Organization and coordination of two technical consultations, namely, the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing and the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing;

[a] FishCode is the special programme of global partnerships for responsible fisheries of FAO. It serves as a principal means through which FAO seeks to combine trust fund and regular programme resources in support of activities to facilitate implementation of the Code.

(b) Organization and coordination, jointly with the International Monitoring, Control and Surveillance Network of a global fisheries enforcement workshop in Malaysia in July of 2005;

(c) Facilitating participation of FAO officers in regional monitoring control and surveillance workshops including vessel-monitoring systems workshops;

(d) Sponsoring workshops for the implementation of the Code and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing through national action plans;

(e) Establishment of the FAO vessel-monitoring systems website (see: www.fao.org/fi);

(f) Provision of technical assistance such as policy and legislative assistance to member countries;

(g) Commissioning of several studies and technical information papers.

H. Selected Food and Agriculture Organization of the United Nations assistance to countries

52. FAO assistance to countries relating to flag State responsibilities was provided under the following documented projects:

- TCP/ANT/2902, report on assistance in the review of the fisheries legislation of Antigua and Barbuda, Henning O. Teigene, Associate Legal Officer and Bisessar Chakalall, Senior Fishery Officer, FAO, July 2004
- Report of the Conference on the National Strategy for Marine Fisheries Management and Development in Viet Nam, Hanoi, 26 and 27 April 2005 (FAO/FishCode, Review. No. 16, FAO, Rome (2005)
- Report of the national seminar on the reduction and management of commercial fishing capacity in Thailand, FAO/FishCode, Review. No. 13, FAO, Rome (2005)
- Fishery policy in the Marshall Islands, FAO/FishCode, Review. No. 15, FAO, Rome (2005)
- TCP/GEO/2904 "Strengthening the capacity of the Department of Fisheries to support fisheries sector rehabilitation, final report", Melvin Spreij, International Legal Consultant for the Development Law Service, FAO, Rome (March 2005)
- TCP/JAM/2901 "Development of a policy framework and strategic plan for sustainable fisheries management; report on the drafting of instructions for the revision of the Jamaican draft fisheries bill", Blaise Kuemlangan, Legal Officer, Development Law Service, FAO (March 2005)
- TCP/MDV/2801 "Assistance in fisheries and marine resources management policy and legislation", report to the Government of Maldives on revision of the legal framework for fisheries development and management, Annick Van Houtte, Legal Officer, Development Law Service, FAO

- TCP/URU/2802 "Asistencia en legislación pesquera — aspectos técnico-institucionales del sector pesquero Uruguayo", Francisco Pereira, José Juste, FAO, Rome (April 2003)

I. Selected papers, studies and reports relating to flag State implementation and the 1993 Food and Agriculture Organization of the United Nations Compliance Agreement, the 1995 Code of Conduct for Responsible Fisheries, the international plans of action and FishCode

- Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing, Miami, Florida, United States of America, 23 to 25 September 2003, FAO Fisheries Report No. 722, FAO, Rome (2004)
- Report of the Workshop on the Implementation of the 1995 FAO Code of Conduct for Responsible Fisheries in the Pacific Islands: A Call to Action, Nadi, Fiji, 27 to 31 October 2003, FAO Fisheries Report No. 731, FAO, Rome (2004)
- Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing — Southern and East Africa Subregion, Kariba, Zimbabwe, 24 to 28 November 2003, FAO Fisheries Report No. 730, FAO, Rome (2004)
- Report of the General Fisheries Commission for the Mediterranean Workshop on Illegal, Unreported and Unregulated Fishing in the Mediterranean, Rome, 23 and 26 June 2004
- Report of the technical consultation on international guidelines for the ecolabelling of fish and fishery products from marine capture fisheries, Rome, 19 to 22 October 2004
- Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 31 August to 2 September 2004, FAO Fisheries Report, No. 759, FAO, Rome (2004)
- Report of the Technical Consultation to Review Progress and Promote the Full Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the International Plan of Action for the Management of Fishing Capacity, Rome, 24 to 29 June 2004, FAO Fisheries Report No. 753, FAO, Rome (2004)
- Report of the third Intergovernmental Consultation on the Establishment of a Southwest Indian Ocean Fisheries Commission, Nairobi, 27 to 30 January 2004, FAO Fisheries Report No. 742, FAO, Rome (2004)
- Swan, J., "International action and responses by regional fishery bodies or arrangements to prevent, deter and eliminate illegal, unreported and unregulated fishing", FAO Fisheries Circular No. 996, FAO, Rome (2004)
- Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated

Fishing — Caribbean Subregion, Port of Spain, 22 to 26 November 2004, FAO Fisheries Report No. 764, FAO, Rome (2005)

- Brown, C., "Model plan for a Pacific Island country: national plan of action to prevent, deter and eliminate illegal, unreported and unregulated fishing", FAO, Rome (2005)
- Cacaud, P., "Fisheries laws and regulations in the Mediterranean: a comparative study", Studies and Reviews, General Fisheries Commission for the Mediterranean, No. 75, FAO, Rome (2005)
- Report of the General Fisheries Commission for the Mediterranean Workshop on Illegal, Unreported and Unregulated Fishing in the Mediterranean, Rome, 23 and 26 June 2004, FAO Fisheries Report No. 767, FAO, Rome (2005)
- "Progress in the implementation of the Code of Conduct for Responsible Fisheries and related international plans of action", Committee on Fisheries — COFI 2005/2
- Report of the Expert Consultation on Data Formats and Procedures for Monitoring, Control and Surveillance, Bergen, Norway, 25 to 27 October 2004, FAO Fisheries Report No. 761, FAO, Rome (2005)
- Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing — Pacific Islands Subregion, Nadi, Fiji, 29 August to 2 September 2005, FAO Fisheries Report No. 786, FAO, Rome (2005)
- Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing — Southeast Asia Subregion, Penang, Malaysia, 10 to 14 October 2004, FAO Fisheries Report No. 757, FAO, Rome (2005)
- Report of the Fourth Meeting of Regional Fishery Bodies, Rome, 14 and 15 March 2005, FAO Fisheries Report No. 778, FAO, Rome (2005)
- Report of the twenty-sixth session of the Committee on Fisheries, Rome, 7 to 11 March 2005, FAO Fisheries Report No. 780, FAO, Rome (2005)
- Reports of the Regional Vessel Monitoring Systems Workshops, South-West Indian Ocean, Central America, Caribbean and South-East Asia, FAO FishCode Review No. 14, FAO, Rome (2005) (includes a CD-ROM)
- Swan, J., "Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing: relationship to, and potential effects on, fisheries management in the Mediterranean", Studies and Reviews, General Fisheries Commission for the Mediterranean, No. 76, FAO, Rome (2005)
- 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing — adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005
- Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing — Certain Countries of the Near East Region, Cairo, 11 to 15 December 2005, FAO Fisheries Report No. 793, FAO, Rome (2006)

• Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing — West African Subregion, Accra, 28 November to 2 December 2005, FAO Fisheries Report No. 792, FAO, Rome (2006)

III. International Labour Organization

A. Preface

53. The present 2006 update is based on a paper that was originally prepared in 2003 for the report of the United Nations Consultative Group on Flag State Implementation (A/59/63, paras. 94-136). The 2003 paper provided background information and a review of measures being taken by ILO with respect to flag State implementation in connection with the merchant shipping and fishing sectors. The 2006 ILO update has been prepared for the purposes of the report of the Ad Hoc Consultative Meeting of senior representatives of the international organizations invited by the General Assembly of the United Nations to examine and clarify the role of the "genuine link" in relation to the duty of the flag State to exercise its effective control over ships and the related question of the potential consequences of non-compliance with these international obligations. Participants in the Meeting considered that it would be useful for the purpose of understanding the full range of flag State obligations with respect to working and living conditions of seafarers and the potential consequences of a failure on the part of a State to implement its responsibilities, for this update to reproduce key elements of the 2003 report. It is important that the full scope of the international regulatory system elaborated under the auspices of ILO, IMO and FAO and other relevant international organizations in connection with the duties of flag States be described, in order to identify any gaps that may exist and any opportunities for improvement in this system. The reproduction of elements of the submission in 2003 reflects the view that the two tasks are inherently connected: the purpose and the role of the "genuine link" requirement in article 91 of the 1982 United Nations Convention on the Law of the Sea is to reinforce and support, by indicating the nature of the connection expected in international law, the requirement that a State effectively exercise jurisdiction and control over ships and vessels that fly its flag and over the conditions for seafarers and fishers working on those ships and fishing vessels.

54. Flag States have an important and indeed central role in the international maritime regulatory system. It is critical that any State taking on this important role ensure that it is in a position to fully and responsibly exercise its international obligations with respect to its ships and fishing vessels and the people who work on them. The international legal system provides only a very limited range of mechanisms for responding to States that do not fulfil their international responsibilities in good faith, as also required by international law. International organizations charged with responsibility in these sectors have few, if any, mechanisms available under international law to directly address the problem of States that do not fulfil their international responsibilities. Nevertheless, as outlined below in connection with ILO and other organizations and as outlined in the other updates contained in the present appendix to the report (and in A/59/63), international organizations have developed a range of strategic responses designed to support, encourage and, ultimately, improve and ensure effective flag State

implementation — the underlying purpose of the genuine link requirement — through an array of State-oriented support and accountability actions and ship-level incentives and disincentives, rather than seeking to develop punitive approaches, which are outside their respective mandates.

B. Background information and a review of measures taken by the International Labour Organization concerning flag State obligations and ensuring effective implementation of these obligations

1. Decent work agenda and seafarers and fishers

55. The primary goal of ILO is to promote opportunities for men and women to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. Decent work means productive work in which rights are protected and which generates an adequate income, with adequate social protection. One of the means by which ILO seeks to achieve this goal is through the development, in a tripartite context, of international conventions containing labour standards. The importance of helping to secure decent work through the development of standards that are fully implemented at the national level is particularly relevant to workers at sea, many of whom work on ships and fishing vessels that operate internationally. These workers are among the most vulnerable because of the mobility of their workplaces and employers and because of the complex globalized economic and legal context of their lives and workplaces.

2. Law of the sea, flag State jurisdiction and labour standards

56. Both the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea provide that the State whose flag a ship flies has responsibility under international law for administrative, technical and social matters on that ship. Under international law, this jurisdiction can be regarded as *prima facie* "exclusive". This is indicated by article 92 of the 1982 Convention, which provides that "ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or this Convention, shall be subject to its exclusive jurisdiction on the high seas". Although article 92 refers only to the high seas, both as an operational necessity and as a matter of practice, the primacy of flag State jurisdiction is understood and reinforced throughout the 1982 Convention and in other international regulatory conventions, with some accommodation and allowance for coastal State jurisdiction in matters such as environmental protection and other public law concerns, when the ship is in the territory of a foreign State. The emergence of agreements (conventions and memorandums of understanding) providing for inspection of ships in foreign ports reflects the circumstances envisaged in article 92 and the interaction with the underlying sovereignty and jurisdiction of every State over activities within its territory.

57. Article 94 of the 1982 Convention clarifies that the flag State is required to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". In particular, the flag State is to assume jurisdiction under its internal (national) law over ships that fly its flag and over the seafarers on those ships "in respect of administrative, technical and social matters".

This is a solution designed to provide clear rules and guidance in order to avoid uncertainty and potential conflicts regarding the application of national laws and the exercise of jurisdiction on a ship and over workers when the ship or fishing vessel is voyaging outside the territory of the flag State. Irrespective of the underlying situation regarding the nationality of the workers on the ship or the owners of the ship, the flag State has primary responsibility in international law for regulating (and for protecting) its ships and the workers on board those ships. Article 91 clarifies that a ship is regarded as having the "nationality" of the State whose flag it flies and that there must be a "genuine link" between the flag State and the ship. Given the range of responsibilities of the flag State under article 94 and elsewhere in the 1982 Convention, it is clear that, irrespective of the precise nature of the "link" in each State, it must be sufficient and real enough ("genuine") to enable the State to apply its internal law and effectively exercise jurisdiction and control over the ship and its workers in the matters set out in article 94 and elsewhere in the 1982 Convention, and in the international regulatory conventions that elaborate the content of these obligations, including labour conditions and social matters.

58. Article 94 (3) of the 1982 Convention provides that "every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to (a) the construction, equipment and seaworthiness of ships and (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments". Minimum requirements for these measures are set out in article 94 (4). Importantly, article 94 (5) requires that, in taking the measures referred to in paragraphs 3 and 4 of article 94, States are "required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance". The international labour standards adopted by ILO regarding working conditions on ships (and fishing vessels — the 1982 Convention does not distinguish between ships on this point) provides part of the substantive content of the obligations under article 94 (5) and under the more generally framed obligation under the 1958 Convention on the High Seas.

3. ILO and standard setting for decent work in the maritime and fishing sectors

59. Between 1920 and 2006, ILO adopted 47 sector-specific conventions[e] (including, most recently, the Maritime Labour Convention of 2006, which consolidates many of these earlier conventions), in addition to labour conventions of general applicability (for example, the Freedom of Association and Protection of the Right to Organize Convention of 1948 (No. 87)), and other international instruments such as ILO recommendations, concerning the living and working conditions of seafarers and fishers.[f] The conventions adopted between 1920 and 2005 comprise international labour standards concerning such matters as training and entry into employment; conditions for admission to employment; certificates of competency; general conditions of employment; safety, health and welfare; labour inspection; and social security protection. These standards are primarily directed to flag State obligations, including standards for flag State inspections. However, they also include obligations for States in their capacity as countries supplying maritime labour and, when they choose to carry out enforcement-related actions, provide for

[e] Not all of these have come into force and some are conventions that revise earlier conventions. There are also maritime conventions dealing with dock workers.

[f] See http://www.ilo.org/public/english/dialogue/sector/sectors/mariti.htm.

inspections and potential detentions of foreign ships coming into their ports. Some of these conventions have been ratified by more than 60 States, while others have been ratified by only a few States. In addition to the conventions listed below, ILO has, on its own or in collaboration with FAO, IMO and other international organizations, developed several codes and guidelines providing guidance on flag State implementation of maritime labour standards.[g] Maritime labour conventions from 1920 to 2005 include the following:

- Minimum Age (Sea) Convention, 1920 (No. 7)
- Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)
- Placing of Seamen Convention, 1920 (No. 9)
- Minimum Age (Stockers and Trimmers) Convention, 1921 (No. 15)
- Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)
- Seamen's Articles of Agreement Convention, 1926 (No. 22)
- Repatriation of Seamen Convention, 1926 (No. 23)
- Officers' Competency Certificates Convention, 1936 (No. 53)
- Holidays with Pay (Sea) Convention, 1936 (No. 54)
- Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)
- Sickness Insurance (Sea) Convention, 1936 (No. 56)
- Hours of Work and Manning (Sea) Convention, 1936 (No. 57)
- Minimum Age (Sea) Convention (Revised), 1936 (No. 58)
- Food and Catering (Ships' Crews) Convention, 1946 (No. 68)
- Certification of Ships' Cooks Convention, 1946 (No. 69)
- Social Security (Seafarers) Convention, 1946 (No. 70)
- Seafarers' Pensions Convention, 1946 (No. 71)
- Paid Vacations (Seafarers) Convention, 1946 (No. 72)
- Medical Examination (Seafarers) Convention, 1946 (No. 73)
- Certification of Able Seamen Convention, 1946 (No. 74)
- Accommodation of Crews Convention, 1946 (No. 75)
- Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76)
- Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91)
- Accommodation of Crews Convention (Revised), 1949 (No. 92)
- Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93)
- Seafarers' Identity Documents Convention, 1958 (No. 108)

[g] For example: "Inspection of labour conditions on board ship: guidelines for procedure" (1990) and the IMO/ILO Guidelines for the Development of Tables of Seafarers' Shipboard Working Arrangements and Formats of Records of Seafarers' Hours of Work or Hours of Rest (1999).

- Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109)
- Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)
- Prevention of Accidents (Seafarers) Convention, 1970 (No. 134)
- Continuity of Employment (Seafarers) Convention, 1976 (No. 145)
- Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)
- Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)
- Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976
- Seafarers' Welfare Convention, 1987 (No. 163)
- Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)
- Social Security (Seafarers) Convention (Revised), 1987 (No. 165)
- Repatriation of Seafarers Convention (Revised), 1987 (No. 166)
- Labour Inspection (Seafarers) Convention, 1996 (No. 178)
- Recruitment and Placement of Seafarers Convention, 1996 (No. 179)
- Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)
- Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)

Conventions on work in fishing[b] from 1920 to 2005 include the following:

- Minimum Age (Fishermen) Convention, 1959 (No. 112)
- Medical Examination (Fishermen) Convention, 1959 (No. 113)
- Fishermen's Articles of Agreement Convention, 1959 (No. 114)
- Fishermen's Competency Certificates Convention, 1966 (No. 125)
- Accommodation of Crews (Fishermen) Convention, 1966 (No. 126)

60. Beginning in 2001, and continuing to the present day, ILO has been involved in a major modernization exercise with respect to the maritime labour standards and the standards for work in fishing, aimed at consolidating most of the aforementioned conventions in two comprehensive instruments (see discussion below), which would also include additional obligations designed to improve flag State implementation of obligations designed to achieve decent work conditions.

[b] A number of the maritime labour conventions that apply to merchant shipping also urge States party to apply these standards, to the extent practicable, on ships engaged in commercial maritime fishing (for example, Convention No. 180).

4. Enforcing labour standards and International Labour Organization member State obligations

61. The labour conventions listed above are important in helping achieve decent work conditions. However, the work of ILO does not end with the creation of standards. A sophisticated supervisory mechanism established by the ILO Constitution goes beyond simple unilateral compliance by States that have ratified Conventions and enables all three ILO constituents (workers, employers and government members) to follow up on the way that these standards are applied by member States. To start with, member States are obliged, pursuant to article 19 of the ILO Constitution, to bring a convention adopted by the ILO Conference before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action within 12, or at the latest, 18 months of adoption by an international labour conference. Once ratified, the application of the convention will be the subject of periodic reports made by the member State to ILO on the basis of a specific format determined by the ILO governing body. These reports, submitted pursuant to article 22 of the ILO Constitution, are then examined by the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Conference, or, more specifically, its tripartite Conference Committee on the Application of Conventions and Recommendations. In addition to these reporting and monitoring procedures, article 24 of the Constitution provides that an industrial association of employers or of workers can make a representation to the International Labour Office with respect to any member State that fails, in its view, to secure the effective observance, within the Office's jurisdiction, of any convention that the member State has ratified. Finally, a complaint submitted by a member State or by a delegate to the conference, pursuant to article 26 of the Constitution, may lead to a Commission of Inquiry and eventually to a decision by the International Court of Justice.

62. In addition to these general ILO reporting and accountability mechanisms, the Merchant Shipping (Minimum Standards) Convention of 1976 (No. 147) (see discussion below) also provides for a report to ILO (as well as potential detention of the ship) when a member State, carrying out an inspection of another member State's ship in its port, finds, perhaps as the result of a complaint, that there is a failure with respect to implementation of the relevant ILO maritime labour standards.

5. International Labour Organization measures to improve flag State implementation and enforcement of labour standards in the maritime and fishing sectors.

(a) Established measures

63. The most comprehensive of the maritime labour standards now in force is the Merchant Shipping (Minimum Standards) Convention of 1976 (No. 147). Convention No. 147 provides, inter alia, that a ratifying member State undertakes to have laws and regulations covering a wide range of issues and to exercise effective jurisdiction or control over ships that are registered in its territory with respect to these issues. Matters addressed include safety standards, including standards of competency, hours of work and manning; appropriate social security measures; and shipboard employment and shipboard living arrangements, insofar as these, in the opinion of the member State, are not covered by collective agreements or laid down

by competent courts in a manner equally binding on the shipowners and seafarers concerned. Among other requirements, the member State is to verify by inspection or other means that ships registered in its territory comply with applicable international labour conventions in force that it has ratified and with the laws and regulations, and, as may be appropriate under national law, with applicable collective agreements. The Protocol of 1996 to Convention No. 147 expands upon the matters covered by the Convention, in particular by including the issue of limits on seafarers' hours of work or provision of minimum periods of rest. Convention No. 147 provides for inspections in a foreign State (port State control) in some circumstances. Article 4 of Convention No. 147 provides that the member State carrying out an inspection on a ship that has called into its ports "may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health". Importantly, it also provides that the member State may also send a copy of any report that it has made to the flag State about the problem to the Director-General of the International Labour Office. Convention No. 147 has been ratified by 52 States (as at February 2006), representing more than 50 per cent of world shipping by gross tonnage.

64. ILO is actively promoting the adoption of Convention No. 147 and its Protocol of 1996, through the programme on decent work in the maritime industry.

65. Two other instruments that are particularly relevant to flag State implementation are the Labour Inspection (Seafarers) Convention of 1996 (No. 178) and its accompanying Recommendation (No. 185). Convention No. 178 sets international standards for flag State maritime inspection systems and, inter alia, provides that a member State that ratifies the Convention shall ensure that all ships registered in its territory are inspected at intervals not exceeding three years and, when practicable, to verify annually that seafarers' working and living conditions (defined in article 1, para. 7) conform to its national laws and regulations on these matters. To the extent deemed practicable, the provisions of the Convention also apply to commercial maritime fishing vessels (article 1, para. 5). Convention No. 178 has been ratified by 12 countries (as at February 2006).

66. ILO also participates as an observer (and as resources permit), in the committees of a number of regional port State control agreements and actively cooperates with IMO in a number of related initiatives. This has resulted, particularly in the countries signatories to the Paris Memorandum of Understanding on Port State Control, in pressure on ships (and, indirectly, on flag State authorities) to ensure that living and working conditions are at least on par with the standards of Convention No. 147 and its Protocol, as these are countries subject to inspection under the Memorandum of Understanding. It is noted that the Paris Memorandum of Understanding committee has recently adopted a risk-based inspection regime aimed at "risky ships", an approach intended to provide an incentive to ships, ship operators and flag States to develop a record of compliance with international standards, including labour standards.

(b) Recent and future measures

67. In keeping with recommendations made in 2001 by its bipartite Joint Maritime Commission and subsequent decisions by its governing body, ILO has consolidated the majority of its maritime labour conventions and recommendations into a single framework convention, the Maritime Labour Convention, 2006. After more than four years of extensive consultation, the Maritime Labour Convention, 2006 was

adopted on 23 February 2006 at the ninety-fourth session of the International Labour Conference (by a record vote of 314 in favour and none against, with two of 106 countries abstaining for reasons unrelated to the substance of the Convention). The Maritime Labour Convention, 2006, was designed to firmly establish international labour standards by acting as a "fourth pillar" (complementing the International Convention on the Safety of Life at Sea, International Convention for the Prevention of Pollution from Ships and International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel) of the international maritime regulatory system. It is expected to have a substantial impact in terms of improving flag State ratification, implementation and enforcement of international labour standards for the working and living conditions of seafarers.

68. The Maritime Labour Convention builds upon the existing maritime labour conventions discussed above, but more clearly assigns responsibility to the flag State for all social and labour matters on board its ships. The Convention has a number of objectives, including expressly providing for an effective compliance and enforcement system for labour and social conditions on board ships and securing a level playing field with respect to the conditions of work in this sector. It applies to all ships ordinarily engaged in commercial operations other than ships of traditional build and fishing vessels. In addition, it does not apply to warships. Some flexibility at the national level is also provided with respect to the application of the requirements of the Convention in cases of ships of 200 gross tonnage and below that do not go on international voyages. Two features of the Maritime Labour Convention, 2006, are especially important in this respect in that they move beyond the existing ILO maritime labour conventions and establish a system for flag State certification of specified minimum conditions on board ships.[1] The certification system is expressly designed to work within the existing system of port State control, developed under the various memorandums of understanding and well established in connection with the IMO instruments pertaining to ship safety, marine pollution and, more recently, ship management and security measures. However, the maritime labour documentation system has additional elements that may better ensure both flag State implementation and enforcement and ongoing shipowner compliance with Convention standards. First, it contains a "no more favourable treatment" clause for control activities in the ports of ratifying countries. Secondly, it would require shipowners, broadly defined as any entity that exercises the responsibilities of shipowners under the Convention, to elaborate on a ship-specific basis their approach to ensuring ongoing compliance with national law implementing the Convention standards. This information would be set out in a document, the Declaration of Maritime Labour Compliance, which ships[2] would carry. Importantly, the flag State would also be required to indicate in the Declaration the national legal requirements that it has adopted to implement the requirements of the Convention. This alone may be a helpful step that will assist in improving flag State implementation. The Declaration would be attached to a certificate and would be available for inspection in foreign ports. This system is supported by a complaint mechanism under which seafarers or other interested entities can bring a complaint in a port regarding a breach of the standards of the

[1] The certification system under the Convention will be mandatory for ships of 500 gross tonnage and above engaged in international voyages or voyages between foreign ports. It will also apply, on request by a shipowner, to other ships.

[2] The certification system under the Convention will be mandatory for ships of 500 gross tonnage and above engaged in international voyages or voyages between foreign ports. It will also apply, on request by a shipowner, to other ships.

Convention. This system would be linked to the ILO supervisory mechanism (discussed above) through member State reporting and through filing of port State inspection reports on complaints and ship detentions with the Director-General of ILO. It is expected that a database would be set up, once the Convention is adopted, to monitor such reports. The Convention would also put in place mandatory standards related to the use of recognized organizations by flag States. It also includes standards related to the provision of financial security by shipowners for the repatriation of seafarers and for compensation in the event of death or long-term disability of seafarers due to an occupational injury, illness or hazard.

69. A similar consolidating exercise is under way in ILO regarding the development of a convention relating to decent work in the fishing sector. A draft text for a Work in Fishing Convention (and an associated recommendation) was considered at the International Labour Conference in 2005. The Work in Fishing Convention will be considered for adoption by the International Labour Conference at its meeting in 2007. The draft Convention reviewed by the Conference in June 2005 was similar in its approach and concerns to the Maritime Labour Convention, 2006; however, it was tailored to address the particularities of the fishing sector. It also included a part specifically devoted to securing compliance and enforcement of conditions for work on fishing vessels. For example, it required that a ratifying State "exercise effective jurisdiction and control over vessels that fly its flag by establishing a system for ensuring compliance with the standards in the Convention including, as appropriate, inspections, reporting, monitoring, complaints procedures, appropriate penalties and corrective measures". It also provided for a document evidencing compliance with national laws implementing the Convention, a complaint system and a "no more favourable treatment" clause.

70. The development of a documentation system in the Maritime Labour Convention, 2006, combining well-established port State control measures for ships that do not meet international standards with a port State report to ILO on flag State responses to non-compliance with standards and complaints about violations, as well as the normal operation of the ILO supervisory system, has the potential to improve the accountability of shipowners and the responsibility of flag States to effectively exercise jurisdiction and control over their ships. The inclusion of a "no more favourable treatment" clause in the Maritime Labour Convention, 2006, and, possibly, in a future Work in Fishing Convention, would also help to secure a level playing field and improved work and living conditions on ships and fishing vessels. In order to better ensure its effectiveness, the Maritime Labour Convention, 2006, requires ratification by 30 members of ILO, representing at least 33 per cent of global gross tonnage of ships.

71. The success of these legal developments will depend on securing technical cooperation to assist with training and resources for personnel to carry out control measures in ports, training for flag State inspection systems (including implementation of the Maritime Labour Convention, 2006) revisions regarding recognized organizations and resources to help develop and support a database for the monitoring of unresolved complaints and follow-up activities. Similar support would be needed to support implementation of a Work in Fishing Convention, once it is finalized and adopted.

72. Information about the development of both instruments, including the reports prepared for meetings, the reports of meetings and the convention texts, is available on the ILO website.